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CASES ON CRIMINAL PROCEDURE

SELECTED FROM THE DECISIONS OF THE

SUPREME COURT OF IOWA

BY

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VOL. I

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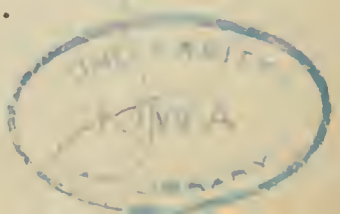

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IOWA CASES

ON

CRIMINAL PROCEDURE

PART I

THE LIMITATIONS OF PROSECUTION

CHAPTER I

JURISDICTION

Section 1.

The Extent of the Authority of the State.

Criminal Prosecutions are subject to limitations of three distinct kinds: namely, jurisdiction, lapse of time and former jeopardy.

Jurisdiction is the power to hear and determine a cause of action. In a very general way we use the word jurisdiction first, to mean the scope of authority of a state; and second, within the state, to signify the scope of authority of its various tribunals. To have jurisdiction over a criminal prosecution means to have power first, to inquire into the facts; second, to apply the law to the facts; and third, if the law as applied to these facts requires it, to pronounce the appropriate sentence. Any given court may lack these powers either because they are not within the judicial machinery of the state at all, or because they are lodged exclusively in some other part of this machinery. If any such question arises we have first to decide whether the state has the power to try the accused for the alleged crime.

State v. Moyers

Supreme Court of Iowa, 1912. 155 Iowa 678.

In a prosecution for unlawfully using nets in the waters of Iowa it appeared that the defendant "had taken fish with a net from that portion of the Mississippi river lying east of Des Moines county without having first procured a license under the laws of this state, but there was a conflict in the evidence as to whether the act was done west or east of the center of the main navigable channel of said river."

McClain, C. J. - In the provisions of the Code regulating the taking of fish in the waters of the state there is a general exception excluding the waters of the Mississippi river (and certain other boundary rivers) from such regulations. Code, section 2547. But in 1909 a statute was enacted providing that in the boundary rivers thus enumerated there should be no fishing with nets or seines without first procuring from the fish and game . .. warden of this state an annual license for the use of such nets and seines, the license fee being fixed by the statute, and the taking by any person of fish of a certain description from said rivers except by hook and line during a specified portion of the year was also prohibited. See chapter 155, Acts of 33d General Assembly, as amended by chapter 117, Acts 34th General Assembly. Prior to the enactment of these statutes, the laws of the state regulating fishing were not applicable to the navigable boundary rivers of the state which were subject to the concurrent jurisdiction of adjoining states. Little v. Green, 144 Iowa, 492. In the statutes last cited this state has attempted for the first time to regulate fishing in these boundary rivers, and the question now presented is whether the state may legislate in regard to fishing in such rivers in the exercise of the concurrent jurisdiction vested in it; that is to say, the question is whether, in the exercise of such concurrent jurisdiction, the state may regulate the taking of fish in the Mississippi river and punish a violation of its statutes, although such violation is committed beyong the middle of the main navigable channel of such river, the middle of the navigable channel being the boundary line between this state and the state of Illinois. See preamble to the Constitution, wherein the boundaries of the state are described in accordance with the act of Congress admitting the state into the Union.

The concurrent jurisdiction of this state over the waters of the Mississippi river without regard to the boundary line between this state and any adjoining state which is asserted in Code, section 3, is dependent upon the act of Congress admitting the state into the Union, which contains the following provision: "The said state of Iowa shall have concurrent jurisdiction on the river Mississippi and every other river bordering on the said state of Iowa, so far as the said rivers shall form a common boundary to said state, and any other state or states now or hereafter to be formed or bounded by the same; such rivers to be common to both." Act March 3, 1845, chapter 48, 5 Stat. 742, amended as to boundaries by Act Aug. 4, 1846, chapter 82, 9 Stat. 52. A similar provision was found in the statute for the admission of the state of Illinois (Act April 18, 1818, chapter 67, 3 Stat. 429), and the concurrent jurisdiction of Iowa and Illinois over the Mississippi river so far as it constitutes the boundary between the two states is dependent upon these provisions. In applying them it has been held by this court that the jurisdiction of this state does not extend to abatement of a nuisance on the Illinois side of the river

consisting of a permanent structure on that side (Gilbert v. Moline Water Power & Mfg. Co., 19 Iowa, 319; Buck v. Ellenbolt, 84 Iowa, 394), but does extend to a criminal nuisance committed on a boat in the river, although such boat was at the time moored to the Illinois shore; State v. Mullen, 35 Iowa, 199. The case last cited is relied upon by the state as sustaining its jurisdiction to regulate the taking of fish in the waters of the river in any portion thereof between the Iowa bank and the Illinois bank of the stream. And it must be conceded that this contention is strongly supported by the case last cited; for, if the Legislature of Iowa may by statute determine what is a nuisance and provide for the punishment of a violation of such statute committed anywhere on the waters of the river between the two states, then it may prescribe what shall constitute the unlawful taking of fish in any portion of the river and punish the violation of such statute, although committed outside of the boundaries of the state, that is, east of the middle line of the main channel. On the other hand, it must be admitted that a serious question is here involved, for, if the contention of the state is to be sustained, then those persons who on the Illinois side of the river engage in the business of fishing in full compliance with the laws of Illinois may nevertheless be subject to punishment if they have not also complied with the laws of Iowa. Taking this case for an illustration, and assuming that there is a statute in Illinois similar to that of this state requiring the payment of an annual license for exercising the privilege of taking fish with nets, one who has fully complied with the Illinois statute by paying the annual license which may be required by the laws of that state would still be punishable under the laws of Iowa if he had not complied with our statute by paying the annual license required by the laws of this state.

This exact question has been fully considered by the Supreme Court of Wisconsin in the case of Roberts v. Fullerton, 117 Wis. 222 (93 N. W. 1111, 65 L. R. A. 953). In that case the conclusion of the majority of the court was that, under provisions as to concurrent jurisdiction similar to those involved in our own case of State v. Mullen, the states of Minnesota and Wisconsin could regulate fishing in that portion of the Mississippi river forming the boundary between the two states only so far as the waters of the river were within the actual territorial limits of the state; that is to say, the right to regulate fishing on the west side of the center of the channel was exclusively in the state of Minnesota, while the right of regulation on the east side of that imaginary and uncertain line was exclusively in the state of Wisconsin. In the majority opinion an attempt is made to define concurrent jurisdiction as relating " to matters at least in some way connected with the use of the water for navigable purposes, to things afloat, or in some legitimate sense on the water - things difficult to deal with if it were necessary to determine in each instance of the exercise of jurisdiction the precise location of the particular act involved as regards the boundary line," with the result that "it does not include the right to regulate the enjoyment, by the people of one state within its domain, of the right to navigate or

fish. It does not empower one state to spread its mere police regulations over territory of another, regulating the sovereign property right of the latter in or to the water flowing over such territory, or to the fish therein or fowls thereon, which it holds in trust for the enjoyment of the whole people within its boundaries, in their individual capacities, under such legal restraints as such other, in its legislative wisdom, may see fit to impose, so long as such enjoyment does not interfere unlawfully with like enjoyment by the people of the state on the opposite side of the boundary." But in the dissenting opinion attention is called to the impossibility of distinguishing between criminal and police legislation of the state addressed to the subject of catching or destroying fish and police or criminal legislation relating to other subjects; and the view is expressed that the concurrent jurisdiction necessarily includes the promulgation of legislation extending over the boundary waters and the enforcement thereof in the manner prescribed by such legislation, whether by courts or by executive officers.

.....

In short, we reach the conclusion that the views expressed by the majority of the Supreme Court of Wisconsin in the case of Roberts v. Fullerton are inconsistent with those expressed by this court in State v. Mullen, supra, and against the substantial weight of authority. The trial court erred, therefore, in making the conviction of the defendant in this case dependent upon a finding of the jury that the act which he was charged with having committed in violation of the laws of the state with regard to fishing was committed on that portion of the Mississippi river west of the boundary line of the state.

.....

Reversed.

State v. Bennett.

Supreme Court of Iowa, 1863, 14 Iowa 479.

"The defendant was indicted for stealing a horse. The court below charged the jury, that if the horse was stolen by the defendant in the State of Missouri, and brought by him into Wapello county, that he might be indicted and convicted in this state. This ruling is the error assigned."

Baldwin, C. J. .....

Mr. Bishop, in his late work on Criminal Law, refers to the conflict of authorities on this question, and shows clearly the fallacy of the reasoning of the judges who hold that the courts of the State to which the stolen property has been taken cannct take jurisdiction of the offense. He says:

"Our courts can try all offenses against our laws, and if a man has property in his hands here, they can inquire what legal relation he sustains to this property; and if it came with him from a foreign country, the relation he sustained to it there establishes his relation to it here. This is familiar law, undisputed, practised upon daily in all our tribunals in the ordinary matters of litigation. The proposition that a man is to escape punishment for the violation of our laws because he first violated the laws of a foreign country, is absurd in itself, and mischievous in its practical application. Nothing is plainer than that when a man is found here with property, our Courts will inquire after the owner of it, equally, whether such owner is alleged to be a foreigner or citizen, present personally or absent. Nothing is plainer than that our Courts will protect the right of property equally whether the property is in the owner's grasp, or wrongfully found in the grasp of the felon. And no principle is better established as a general doctrine than that any physical removal, however slight, of the entire physical substance of the thing alleged to be stolen, to which physical substance the remover has not the right of possession, even though he has it in his custody, lawfully or unlawfully, is, where the felonious intent exists, larceny. If, therefore, the complete offense is not committed here, by one bringing here from a foreign country personal goods which he has there stolen, using them here as his own, meaning at the same time here to deprive the owner of his ownership therein, then it is impossible for any man, under any circumstances, to do acts completely falling within all the descriptions and definitions given in the books of this offense."

In answer to the objection that it renders the prisoner liable to be twice convicted and punished for one offense, in violation of the spirit of the common law, the author says: "The common law either admits of two convictions, in such a case or it does not; if it does, there is nothing in the objection; if it does not, then the first conviction, in what ever locality it takes place, may be plead in bar of the second. The common law, however, knows no such plea in defense of a prosecution as liability to an indictment elsewhere."
1 Bish. Crim. Law, 596, 597.

Affirmed.

Extradition

If the state in which the accused is found has not the power to try him for the crime of which he is accused, the question arises whether the state or nation in which such person could be tried for the offense, has the right to ask the first state to arrest the accused and deliver him over to the second state for trial by it. The surrender of an accused person in this way is called extradition; and where it is between the states of the Union it is frequently referred to as interstate rendition. The demand for extradition is called a requisition.

State v. Hufford.

Supreme Court of Iowa, 1869. 28 Iowa 391.

A person was arrested in this state as a fugitive from justice on the charge that he had committed murder in Illinois. He was taken before a justice of the peace where he entered into a bond for his future appearance. Upon default, suit was brought against him and his sureties upon this bond. From a judgment for the plaintiff, the defendants appealed.

Beck, J. - The cause was tried upon the following evidence: 1. The information upon which the warrant was issued. It charges substantially that defendant, Jeremiah Hufford, is guilty of the crime of murder in the second degree, committed in Knox county, Illinois, by producing an abortion upon one L.L. Strayer, a pregnant woman, which caused her death. It contains no averment that the accused is charged with the crime in the county and State where it was committed, and contains nothing further than the allegations of the commission of the crime by the accused, and the place time and manner of its commission. 2. The warrant in the usual form. 3. The docket of the justice before whom the proceedings were had, showing the issuing of the warrant, the arrest and custody of the accused, his application for a continuance of the examination, the order therefor, the approval of the bond, the default of the accused, and the forfeiture of the bond. 4. The bond sued upon 5. The testimony of the justice that no other formation, affidavit, evidence, statement or paper of any kind was presented to or filed with him in the proceedings.

We find in the record the deposition of a witness, who testifies that he was, at the time the alleged crime was committed, the coroner of Knox county, Illinois, and that he held an inquest upon the body of a woman named L.L. Strayer, then deceased. He states the facts of the impaneling of a jury, the examination of witnesses as to the cause of the death of the woman, and that the jury rendered a verdict that death was caused by an abortion produced by the accused. He sets out in his deposition a copy of the

verdict. This deposition, with that of another witness, was suppressed, because, as the court held, the evidence contained therein was irrelevant, immaterial and secondary. No objection was made to this ruling by the plaintiff. We cannot determine the sufficiency of this evidence, nor could we, should it be held sufficient, consider it, as it was excluded by the court, without objection.

These depositions answer no useful purpose in the record, further than forming the basis of a supposition that evidence may exist, not used upon the trial, that the accused was, in Illinois, legally charged by the verdict of a coroner's jury with the offense for which he was arrested.

The proceedings were instituted under sections 4523, 4528 of the Revision. The first of the sections is in the following words: "If any person be found in this State charged with any crime committed in any other State or territory, and liable by the Constitution and laws of the United States, to be delivered over upon the demand of the governor thereof, any magistrate may, upon complaint on oath, setting forth the offense and such other matters as are necessary to bring the case within the provisions of the law, issue a warrant to arrest such person." The other sections provide, that if it is found upon examination that there is reasonable cause to believe the complaint true, and that the accused may be lawfully demanded of the governor, he shall, if not charged with murder, be required to enter into an undertaking to appear before the magistrate at a future day, and abide his order.

The undertaking is forfeited by a failure to appear according to its conditions. It was ruled by this court in this case (23 Iowa, 579), that, under the provisions of the statute above cited, the jurisdiction of the magistrate need not appear in the information, but may be presumed upon demurrer to the petition in an action upon the bond, and that the want of jurisdiction on account of insufficiency of the proceedings may be set up as a defense and proved upon the trial.

It was also ruled, that the accused, being arrested on a charge of murder in the second degree, a bailable offense under the law of this State, was, if the magistrate had jurisdiction, properly admitted to bail upon the undertaking which is the foundation of this action. The first question presented for determination is this: Did the magistrate, as shown by the evidence, have jurisdiction in the case?

The provisions of the statute above cited authorize the arrest of persons "found in this State charged with any crime committed in any other State or territory, and liable by the Constitution and laws of the United States to be delivered over upon the demand of the governor thereof," etc. We understand from this language, that, to authorize the arrest, there must be a

charge pending against the accused in another State or territory. This construction is made entirely plain by article 4, section 2 of the Constitution of the United States, which is as follows: "A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction in the cause."

The act of congress, 12th February, 1793, section 1, providing for the removal of fugitives from justice from a State where found to the State where the crime was committed, prescribes that the executive authority demanding the fugitive shall present an indictment or affidavit charging the accused with the crime, with his demand upon the governor of the State, where the fugitive is found, for his return. The provision of our statute, above quoted, provides for the arrest of persons, who "are liable by the Constitution and laws of the United States to be delivered," upon the demand of the executive of the State where the alleged crime was committed. The Constitution and statute of the United States, as it appears by the provisions above cited, require the accused to be delivered up when charged with the crime in the State where it was committed. It is quite clear that our statute, being enacted in aid of the foregoing constitutional and statutory requirement of the United States, contemplates that a charge of the crime against the person to be arrested and delivered up must be made in the State where the offense was committed.

This charge must be made to some court, magistrate or officer, in the form of an indictment, information, or other accusation, known to the law of the State in which the offense was committed. We conclude, therefore, that unless the accused in this case was so charged, the magistrate had no jurisdiction. Ex parte Smith, 3 McLean, 121; Ex parte Clark, 9 Wend. 212; Matter of Hayward, 1 Sandf. 701.

The evidence upon which this case was tried contains no proof that the accused was charged with the crime in Illinois, where it is alleged to have been committed. The jurisdiction of the magistrate is neither averred in the complaint or information, nor shown by the evidence; it cannot be presumed. We must regard the proceedings, therefore, as void.

It is argued that defendants are estopped to deny the jurisdiction of the justice because they voluntarily executed the bond. The consent of parties, in a criminal proceeding, will not confer jurisdiction. The voluntary execution of the bond, in this case, could not. If jurisdiction was wanting, the magistrate had no authority to take the bond, for there was, in the view of the law, no case before him, all the proceedings therein, including the bond, being void and held for naught.

Reversed.

Morrison v. Dwyer.

Supreme Court of Iowa, 1909. 143 Iowa 502.

The plaintiff, having been arrested under a warrant of the governor directing his surrender to the defendant as agent of the governor of Nebraska, petitioned for a write of habeas corpus. The writ was denied and the plaintiff appealed. Another case involving the same facts was disposed of by the Supreme Court at the same time.

McClain, J. - Requisitions of the Governor of Nebraska for the surrender of the petitioners were presented to the Governor of Iowa, and, after a hearing by the latter, of which no complaint is made, except with reference to the sufficiency of the requisition papers, warrants were issued for their surrender to the agent of the state of Nebraska. To prevent such surrender these proceedings were instituted. The refusal of the lower court to grant a writ of habeas corpus is assailed in this court on three grounds: First, the insufficiency of the complaints filed before the county judge in Nebraska, in which each of the petitioners was charged with the commission of a crime in that state; second, the insufficiency of the certification of a copy of such complaint by the Governor of Nebraska; and, third, the insufficiency of the evidence to show that petitioners were in fact fugitives from justice.

I. The complaint charging petitioners with the commission of a crime in Nebraska was sworn to by the county attorney of the proper county, and it was made to appear that this was the proper method in that state of charging persons with the crime of which petitioners were accused. A complaint or information, duly sworn to is such affidavit as is required as the basis of an extradition proceeding, if it is a proper method of charging the commission of the crime in the state where committed. In re Hooper, 52 Wis. 699 (58 N. W. 741); State v. Richardson, 34 Minn. 115 (24 N. W. 354); State v. Bates, 101 Minn. 303 (112 N. W. 261).

Appellants contend that a complaint by a county attorney is necessarily on information and belief, and that such an affidavit is not sufficient. But the complaints in these cases were not sworn to as true only on information and belief. The allegations of fact therein are sworn to as true without qualification, and it is not for us to say that the county attorney swore to the truth thereof only on information and belief. If sufficient in form a court can not inquire as to the knowledge of the affiants as to the facts.

It is further contended that the certifications of these complaints are not in such form as to entitle them to be introduced and received in evidence in another state, under the state and federal statutes relating to certification of the records of judicial proceedings. But there is no merit in this objection. Petitioners themselves offered these certifications in evidence in the

lower court. The defendants were under no obligation to do more than show a certification of copies of such complaints by the Governor of Nebraska. See Rev. St. U. S. section 5278 (U. S. Comp. St. 1901, 3597).

II. But it is argued that, if the complaints were not duly authenticated, they could not be properly certified as authentic by the Governor under the federal statute requiring that he certify the authenticity of the complaints on which the extradition is demanded. There is nothing in the federal statute specifying how the Governor is to be satisfied that the complaints on which he acts are authentic. That is a question for his own determination. His certificate to the fact alone is required. If the proceedings are regular in form, it is for the person attacking them to show that he is not a fugitive from justice. McNichols v. Pease, 207 U. S. 100 (28 Sup. Ct. 58, 52 L. Ed.121); Pierce v. Creecy, 210 U.S. 387 (28 Sup. Ct. 714, 52 L. Ed. 1113).

III. While the petitioners attempted to show by evidence that they were not in Nebraska at the time the crime with which they were charged was committed, there was ample evidence for the defendants to prove the contrary. In a proceeding by habeas corpus the finding of the lower court as to questions of fact has the force of a verdict of a jury, and, if supported by any evidence, is conclusive upon this court as to such questions. Myers v. Clearman, 125 Iowa, 461; Dunkin v. Seifert, 123 Iowa, 64.

Finding no error in the rulings of the lower court complained of, the action of the court in each case denying plaintiff's petition for writ of habeas corpus is affirmed.

Jones and Atkinson v. Leonard.

Supreme Court of Iowa, 1878. 50 Iowa 106.

The plaintiffs were indicted in the State of Massachusetts for the crime of false pretenses. The plaintiffs were in this state at the time of the commission of the offense in Massachusetts, but on the requisition of the governor of Massachusetts, the governor of Iowa issued a warrant for the arrest of the plaintiffs and their delivery to an agent of the governor of Massachusetts. The defendant made the arrest and the plaintiffs petitioned for a writ of habeas corpus. The plaintiffs were discharged from custody and the defendant appealed.

Seevers, J. - The learned judge of the Circuit Court discharged the plaintiffs from custody, as we infer, on two grounds: First, that the plaintiffs were not in fact fugitives from justice, for

the reason that they had never fled; and, second, the evidence accompanying the requisition failed to show they were such; and appellees mainly, if not entirely, rely thereon for an affirmance. It is not claimed the plaintiffs were ever even temporarily residents of the State of Massachusetts. At the time the alleged crime was committed they were citizens of and residents of this State.

The false pretense was contained in a letter written by them in this State to certain persons in Boston, in which it was stated they owned a large amount of property over and above their indebtedness, by means of which they obtained on credit certain merchandise.

The Constitution of the United States provides that "a person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

It is provided by a statute of this State that the requisition of the Governor of another State "shall be accompanied by sworn evidence that the party charged is a fugitive from justice." Code, § 4174.

The sworn evidence accompanying the requisition consisted of an affidavit in which it was stated the plaintiffs "are fugitives from justice." There are grave doubts whether such a statement constitutes the evidence required by the statute. Whether the plaintiffs were such fugitives is a mixed question of law and fact. The latter being stated or ascertained, a legal conclusion would follow or be based thereon. Instead of stating facts, the affidavit states nothing more than the legal conclusion of the person making the affidavit. The statute requires the Governor to determine whether or not the person or persons are fugitives from justice. Sworn evidence is to be submitted to him to enable him to do so. Such evidence may be in the form of affidavits. But instead of any facts being stated, upon which an independent judgment could be formed, the Governor must have relied wholly on the legal conclusion of another.

It seems to us that to sanction such a proceeding would be establishing a dangerous precedent. By issuing his warrant for the arrest of the plaintiffs it may be said the Governor has determined this question. But this does not conclude all inquiry by the courts as to the sufficiency of the evidence upon which his conclusion was based. It may be conceded that the affidavit was prima facie sufficient, or rather it was the province of the Governor to so determine. But this we do not think is conclusive upon this or any other question connected with the extradition of the citizen. This point will be further noticed hereafter. Conceding, however, that the determination of the Governor is conclusive as to the sufficiency of the affidavit, we have for determination the question whether the plaintiffs are in fact fugitives from justice.

Bouvier defines such a person to be "one who, having committed a crime in one jurisdiction, goes into another in order to evade the law and avoid punishment" (1 Bouvier's Law Dictionary, 551); and the Constitution of the United States defines such person to be one "who shall flee from justice."

It is difficult to see how one can flee who stands still. That there must be an actual fleeing we think is clearly recognized by the Constitution of the United States. The words "who shall flee" do not include a person who never was in the country from which he is said to have fled.

It is urged, however, that the plaintiffs were constructively in Massachusetts at the time the crime is alleged to have been committed, and that they have constructively fled therefrom.

In The People v. Adams, 3 Denio, 190, it was held that a person actually a resident of Ohio could commit a crime in New York, and upon his coming voluntarily in the last named State he could there be tried and convicted. We are not required to either approve or disapprove the doctrine laid down in this case, and it will be presumed the laws of Massachusetts are the same as those of New York in this respect. In the cited case the defendant went voluntarily into the State of New York, and it might with much propriety be said that, having so done, he was amenable to the laws thereof.

The question in the case at bar is very different. Granting that a crime may be thus committed, the question before us is whether, then, the State of Iowa is bound to surrender a citizen to the State in which the crime was committed? This depends upon the obligation in this respect imposed by the Constitution of the United States. Before it can be said there is such an obligation, two things must appear. There must be - First, a crime charged; and, second, that the person charged is a fugitive from justice; that is to say, "that he has fled from the State in which he is charged with the crime to escape punishment." Such must be the legal effect of his fleeing. In other words, he must have been in the State, committed the crime, and fled.

The Constitution of the United States does not require Iowa to surrender, on the demand of a sister State, as a fugitive from justice, one who only constructively has fled from the latter. Hurd on Habeas Corpus (2d Ed.), 612.

If the decision of the Governor is final and conclusive as to this question, it must be so as to all questions touching the extradition of a citizen under the constitutional provision above quoted. Counsel for the appellant concede there are cases in which a writ of habeas corpus may issue, and the prisoner be discharged. In fact, the power of the courts at this day cannot be seriously questioned. Hurd on Habeas Corpus (2d Ed.), 621; In the matter of Manchester, 5 Cal., 237; Ex parte Smith, 3 McLean, 121.

The Governor of this State is not clothed with judicial powers, and there is no provision of the Constitution or laws of the United States or of this State which provides that his determination is final and conclusive in the case of the extradition of the citizen.

In the absence of such a provision we hold that the decision of the Governor only makes a prima facie case; that it is competent for the courts, in a proceeding of this character, to inquire into the correctness of his decision, and discharge the prisoner.

Affirmed.

State v. Day.

Supreme Court of Iowa, 1882. 58 Iowa 678, 12 N. W. 733.

The defendant having been convicted of burglary, appealed on the ground that the court was without jurisdiction for the reason that he was arrested in Wisconsin and turned over to the Iowa authorities without a warrant and before any complaint was filed against him in Iowa.

Rothrock, J. - I. After the trial in the court below the district attorney and the attorney for the defendant entered into the following stipulation. "It is stipulated in the above entitled cause between defendant and the district attorney of the 10th judicial district of Iowa, that defendant was arrested in Wisconsin, before any complaint or indictment was made or filed against him in Iowa, or any where else; that the arrest was made without any warrant or legal process and on suspicion; that the arrest was made by the officers of Prairie du Chein in connection with the officers of Clayton county, Iowa; that defendant objected to being taken to Iowa, and protested with the officer against being arrested in Wisconsin and taken therefrom to Iowa; that the said officers disregarded his protests and brought him within the jurisdiction of said District Court, for the purpose of having an information filed against him and a warrant issued thereon in Clayton county, Iowa; that defendant was held in custody, under said process, being a warrant issued in Clayton county, Iowa, on the same day of his arrest and after he was brought into Clayton county, Iowa; that he was regularly indicted and duly arraigned in said court, and plead not guilty to the indictment. On the trial the foregoing facts appeared in the testimony, and defendant moved the court for discharge of defendant before the case was submitted to the jury. The motion was overruled and defendant excepted to the ruling. Defendant was convicted by the jury and sentenced to six years in the penitentiary.

"It is hereby stipulated to submit the question of jurisdiction raised under the above facts."

It is contended by counsel for appellant that the motion for a discharge should have been sustained.

The removal of the defendant to this State without warrant or authority may have been illegal under the laws of Wisconsin. If it was, the parties guilty of wrong are amenable to the laws of that State. But the courts of this State will not, upon a trial of an indictment upon a plea of not guilty, inquire as to whether or not the defendant was properly or improperly brought within the jurisdiction of the court. A party cannot claim immunity from an offense charged upon any such ground. Counsel cite State v. Hufford, 28 Iowa, 391, in support of the claim made that the defendant should have been discharged. In that case the defendant was arrested in this State as a fugitive from justice, on the charge that he had committed a murder in the State of Illinois. He was taken before a justice of the peace and entered into a bond for his future appearance and made default, and suit was brought upon the bond. It was held that there could be no recovery upon the bond because it did not appear that the defendant was charged with the crime in Illinois, by way of indictment, information, nor by any accusation known to the law. This statement of the case is sufficient to show that it has no application to the case at bar.....

Affirmed.

State v. Kealy.

Supreme Court of Iowa, 1893, 89 Iowa 94, 56 N.W. 283.

The defendant was extradited from New York to Iowa upon an indictment charging him with false pretenses. Afterwards, and without giving him a reasonable opportunity to return to New York, he was tried here on an indictment charging him with forgery. The defendant, having been convicted on this charge, after a motion that he be discharged from restraint on this indictment, appealed.

Rothrock, J. - The defendant was indicted for the crime of obtaining money under false pretenses. After the crime was committed, he left this state, and went to the state of New York. A requisition was made upon the governor of that state for the extradition of the defendant, upon the ground that he had been indicted in this state, and he was returned to this state in pursuance of the requisition. After he was brought to this state, and

while he was in custody under that indictment, he was indicted for forging a promissory note. When he was brought into court on the last indictment, he made a motion to be discharged from restraint on the indictment for forgery, on the ground that he was not extradited on that charge, and that, being in restraint on the first charge, he could not be required to plead to the second indictment, nor could he be restrained of his liberty by reason thereof, he never having had an opportunity to return to the state of New York. The court overruled the motion, and required the defendant to plead to the indictment. A plea of guilty was entered, and the defendant was sentenced to imprisonment in the penitentiary for two years.

It appears from the abstract in the case that the two indictments were founded upon wholly different and distinct charges, and, as we understand it, they did not involve the same transaction. The record does not show what disposition was made of the indictment of obtaining money under false pretenses. It is stated in argument that the defendant was sentenced to imprisonment for one year on that charge.

The question presented for decision is stated by counsel for the appellant in the following language: "Can a party taken from one country or state to another, upon proceedings of extradition, legally be held to answer to another and different offense than that upon which he was so extradited, without being given an opportunity to return to the state of his asylum?"

This case does not involve any question of international extradition. The defendant's removal from the state of New York to this state was not procured by any fraudulent pretense or representation made to him for the purpose of bringing him within the jurisdiction of our courts. It is provided by section 2, article 4, of the constitution of the United States, that "a person charged in any state with treason, felony or other crime, who shall flee from justice and be found in another state, shall on demand of the executive authority of the state from which he fled be delivered up to be removed to the state having jurisdiction of the crime." There was no abuse of this constitutional provision in this case. Extradition was not resorted to as a means of procuring the (presence) of the defendant in this state for the purpose of serving him with process in a civil action. There can be no question that the grand jury of Jones county, in this state, had the power to find the second indictment against the defendant, and there was the same right of extradition upon that charge that there was on the first indictment. His counsel states in argument that he was sentenced to the penitentiary for one year on the first indictment, and the imprisonment of two years on the second indictment was to commence at the expiration of the imprisonment on the first. It will be observed that what the defendant demanded was that the second indictment should be held in abeyance until he was discharged from imprisonment on the first, and until a reasonable

time and opportunity had been given after his release on the first charge to return to New York, from which asylum he was forcibly taken on the first charge.

There is a conflict of authority upon this question. This court is committed to the doctrine that, when a person is properly charged with a crime, the courts will not inquire into the circumstances under which he has brought into this state, and within the jurisdiction of the court, State v. Ross, 21 Iowa, 467. It is true that the defendants in that case were not brought to this state under a requisition upon the executive of another state. They were arrested in the state of Missouri without legal warrant, and after being forcibly brought to this state they were rearrested and turned over to the civil authorities, and indicted. It is said in that case, that, "the officers of the law take the requisite process, find the persons charged within the jurisdiction, and this, too, without force, wrong, fraud, or violence on the part of any agent of the state, or officer thereof. And it can make no difference whether the illegal arrest was made in another state or another government. The violation of the law of the other sovereignty, so far as entitled to weight, would be the same in principle in the one case as the other. That our own laws have been violated is sufficiently shown by the indictment. For this the state had a right to detain the prisoners, and it is of no importance how or where their capture was effected." In the case at bar the Defendant was properly indicted, and, when process was issued on the indictment, it is of no importance by what authority he was brought into this state. In support of this doctrine: State v. Stewart, 60 Wis. 587; Ham v. State, 4 Tex. App. 645; State v. Brewster, 7 Vt. 118; Dow's Case, 18 Pa. St. 37; State v. Wensel, 77 Ind. 428; Kerr v. People, 110 Ill. 627. The first two cases above cited are founded on facts substantially the same as the case at bar. As we have said, there is a conflict of authority upon the question. The cases will be found collected in 7 Am. and Eng. Encyclopedia of Law, 648. We have no disposition to depart from the rule adopted by this court in State v. Ross, supra, and the judgment of the district court is Affirmed.

Edmunds v. Griffin.

Supreme Court of Iowa, 1916. 177 Iowa 389.

The plaintiff, having been arrested uher a warrant of the governor and surrendered to an agent of the governor of Colorado, petitioned for a writ of habeas corpus to secure his release, on the ground of the insufficiency of the indictment found against him in Colorado. He moved for a continuance of the proceedings to enable him to secure the attendance of witnesses who would prove an alibi. This motion was denied and the plaintiff was not released. He appealed.

Deemer, J. - Plaintiff was indicted by the grand jury of Huerfano County, Colorado, for the crime of murder. The indictment was in short form, as follows:

"That the defendnat did then and there feloniously, wilfully, deliberately, premeditatedly, and of (his) malice aforethought kill and murder one Pliny P. Lester, contrary to the form of the statute," etc.

The indictment was in exact conformity with the statutes of Colorado. See Colorado Statutes of 1908, p. 577, Section 1956, reading as follows:

"Sec. 349. All exceptions which go merely to the form of an indictment shall be made before trial, and no motion in arrest of judgment or writ of error shall be sustained for any matter not affecting the real merits of the offense charged in such indictment; no indictment shall be quashed for want of the words, 'with force and arms,' or of the occupation or place of residence of the accused, nor by the reason of the disqualification of any grand juror or grand jurors; and in any indictment for murder or manslaughter it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused, but it shall be sufficient in every indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased; and it shall be sufficient in every indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased. (G. S. § 926; L. '79, p. 50 § 1, amending G. L. § 786, R. S. p.236, § 180.)"

At the time the indictment was returned, plaintiff was not in the state of Colorado, but had come to Iowa, where, shortly after the return thereof, he was arrested, and, the governor having honored a requisition from the governor of Colorado, he is turned over to the agent thereunto appointed, and this proceeding was to secure his release from custody. When the issues were settled by pleadings, plaintiff filed a motion for continuance, in order to secure the attendance of witnesses by whom he could prove an alibi: that is, that, though in Colorado at the time the crime is alleged to have been committed, he was not in Huerfanc County, but in Colorado City or Denver, and could not have committed the offense. Objections to this were made on various grounds, and the motion was denied. The case then went to hearing, but no testimony was introduced save to present the records, documents and writs issued by the executive heads of the two states, and the Statutes of the state of Colorado. These all appear to be in proper form, and the only questions arising on this appeal relate to the ruling on the motion for a continuance, and the sufficiency of the indictment. Other matters are discussed, but, as they are not substantiated by the record, we shall give them no attention. The ruling on the motion to continue was largely discretionary with the trial court. The requirements of the statute were not fully met, and on

this ground alone the motion might have been denied. Aside from this, all that plaintiff expected to show by the witnesses named by him in his motion was that, while he was in the state of Colorado at the time the offense is said to have been committed, he was not in the county where the murder is alleged to have been committed, and, therefore, could not have committed it - in other words, an alibi. Such a showing would not entitle him to a release. He was a fugitive here, according to well-established rules, and the question of his guilt or innocence must be determined by the courts of the demanding state. This matter has so recently been decided by us that we need do no more than cite the authorities in support of the rule. Leonard v. Zweifel, 171 Iowa 522; Taylor v. Wise, 172 Iowa 1; Harris v. Magee, 150 Iowa 144.

II. Again, it is said that the indictment against the petitioner lacks the essential elements necessary to constitute a charge of murder. It does follow the Colorado statute, although it would doubtless be insufficient under our law. But the indictment is to be tested by the law of the place where found. Recognizing this principle, the petitioner, nevertheless, contends that the Colorado statute from which we have quoted is unconstitutional, in that it deprives petitioner of due process of law, of the right to know what the offense is that is charged against him and all the particulars thereof.

It is also claimed that such a statute is in contravention of the Bill of Rights of the Federal Constitution and of the Constitutions of both states, and is unreasonable and arbitrary and should be so pronounced by this court. This statute has reference to procedure only, and to the form of an indictment for murder. It is within the power of each state to regulate its own procedure, and a statute for this purpose must clearly offend against some constitutional provision before it will be declared void by the courts. Counsel have not pointed out any constitutional provision, either state or national, which covers the point; but they do insist upon some generalities which they seem to think cover the case. We find nothing upon which to base the argument. On the contrary, the Colorado court has sustained the statute against such an attack. Jordan v. People (Colo.), 36 Pac. 218, 220. See, also, Ryan v. People (Colo.), 114 Pac., 306; Andrews v. People (Colo.), 79 Pac. 1031; Cremar v. People (Colo.), 70 Pac. 415. The reasoning of the Colorado court is sound, and although not conclusive upon us, it is so persuasive that nothing need be added. It is there said:

"The statute, taking its origin in England, has been adopted in a number of our states; and, so far as we are advised, wherever the question has been raised, the statute has been held constitutional, and indictments in the form provided held sufficient to charge murder of the first degree. 2 Bish. Cr. Proc. (2d Ed.) ¶ ¶ 523-539, and cases cited. The act is not in conflict with the section of the bill of rights providing that 'in criminal prosecutions the accused shall have the right . . . to demand the

nature and cause of the accusation.' Const. Art. 2, § 16. An information must show the nature and cause of the accusation, i.e., it must set out the crime charged. It need not set out the mode or manner of its perpetration, or the instrument or agency employed to accomplish the result." Jordan v. People, supra.

We reach the conclusion that the trial court properly denied the writ, and the order must be and it is affirmed, and petitioner is ordered delivered to the defendant Miller as agent for the state of Colorado.

Evans, C.J., Weaver and Preston, JJ., concur.

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Section 3

Venue.

If an alleged offense is found to be one that is triable in this state, it is then necessary to determine which of our courts may try it. As a rule the case must be tried in the county in which the crime was committed. This county is called the venue.

State v. Dvoracek.

Supreme Court of Iowa, 1908. 140 Iowa 266.

In a trial for statutory desertion one problem involved was whether the venue was correctly laid. The indictment was found in the county in which the wife and child resided, although the defendant was then living elsewhere. In deciding that the venue was rightly laid, Ladd, C. J., speaking for the court said:

II. Was the venue rightly laid? "The local jurisdiction of the district court is of offenses committed within the county within which it is held, and of such other cases as are or may be provided by law." Section 5154, Code. This case is not within any of the exceptions alluded to, unless it be Section 5157 of the Code, which provides that: "When a public offense is committed partly in one county and partly in another, or when the acts or effects constituting or requisite to the consummation of the offense occur in two or more counties, jurisdiction is in either county except as otherwise provided by law." The statute under consideration, save the portion in relation to abandonment, is essentially negative. The penalty is denounced, not on the commission of any affirmative act, but on the omission of the plainest duty. Necessarily, then, the venue depends on where the omission to perform the duty occurred. The accused had settled with his family in Story County. Neither he nor they had done anything to change that residence. This being so, it was his duty as husband and father to provide for them and furnish them with food, clothing and shelter at their place of residence in Story County. He owed no such duty elsewhere, and, because of the situation of his wife and children, must have omitted the duty in Story County, or not at all. Somewhat akin in principle is the line of cases deciding that the avenue in embezzlement cases may be laid in the county in which it was the duty of the accused to account. State v. Hengen, 106 Iowa, 711; State v. Maxwell, 113 Iowa, 369. The presence of the offender within the county where a crime is committed is not always essential, but some portion of the act or ommission to act must have taken effect therein. 1 Bishop, New Crim. Proc. 53; 1 Bishop, New Crim. Law, 110, 111; People v. Griffen, 2 Barb. (N. Y.) 427. While defendant, if so inclined, might have sent the means of support from the place where he was staying in Hamilton County to have been effective these must have been furnished in

Story County. So that, in any event, the omission of the duty was at least in part in the county where the indictment was returned. The offense is somewhat novel, but upon full consideration we are of the opinion that the venue is in the county where the duty of providing for the wife and children should be discharged. As supporting this conclusion, see Johnson v. People, 66 Ill. App. 103; Bennefield v. State, 80 Ga. 107 (4 S. E. 869).

State v. Gibson

Supreme Court of Iowa, 1906. 132 Iowa 53, 106 N. W. 270.

From a judgment of conviction of the crime of false pretenses, the defendant appealed.

Deemer, J. - The indictment charges in substance that defendant, with another, by false statements, pretenses, and representations, obtained from the Des Moines Mutual Hail Insurance Association, of Des Moines, Iowa, the sum of $24.80 in lawful money of the United States. The testimony shows that defendant was acting as agent for the insurance association in soliciting and forwarding applications for insurance; that he forwarded pretended applications by mail from Chickasaw county, Iowa, to the insurance association at Des Moines. Pursuant to defendant's request, the insurance association mailed a check for $24.80 to him, drawn upon a bank in Des Moines, Iowa, as his commission for securing applications for insurance. This check was received by defendant in Chickasaw county, indorsed by him, and cashed by a bank at New Hampton in said county. Through the agency of this latter bank the check finally reached Des Moines, was there honored by the bank upon which it was drawn, and the amount thereof charged against the account of the insurance association.

It is contended in argument that the defendant did not receive the money in Des Moines, or Polk county, but in Chickasaw county, and that the district court of Polk county had no jurisdiction of the offense. Under the evidence there can be no doubt that the defendant made the false pretenses with which he is charged in Polk county, Iowa; for the applications were there received and acted upon by the insurance association. Placing the same in the mail to be forwarded to the insurance company was not, so far as the criminal aspect of the case is concerned, a false pretense in the county where the applications were prepared or received by the defendant. State v. House, 55 Iowa, 466.

But it is stoutly insisted that the money was procured in Chickasaw county and not in Polk, where Des Moines is situated.

We have a statute (Code, section 5157) which provides that when a public offense is committed partly in one county and partly in another, or when the acts or effects constituting or requisite to the offense occur in two or more counties, jurisdiction thereof is in either county. This would seem to settle the question now being considered. Com. v. Goldstein, 3 Pa. Co. Ct. R. 121; Norris v. State, 25 Ohio St. 217 (18 Am. Rep. 291); State v. Lichliter, 95 Mo. 402 (8 S. W. 720); Com. v. Taylor, 105 Mass. 172; Reg. v. Leach, 7 Cox, C.C. 100; People v. Dimick, 107 N.Y. 33 (14 N. E. 178); Reg. v. Jones, 162 Cox, C. C. 198. Aside from statute there may be some doubt as to the venue of the offense under such a state of facts as is here disclosed. See Roberts v. People, 9 Colo. 458, 13 Pac. 630; State v. Palmer, 40 Kan. Sup. 474 (20 Pac. 270); Burton v. U. S., 25 Sup. Ct. 243 (49 L. Ed. 482); State v. Schaeffer, 89 Mo. 271 (1 S. W. 293); Connor v. State, 29 Fla. 455, (10 South. 891, 30 Am. St. Rep. 126); Graham v. People, 181 Ill. 477 (55 N. E. 179, 47 L. R. A. 731); U. S. v. Plymoton, 4 Cranch, C. C. 309, (Fed. Cas. No. 16,058); Bates v. State, 124 Wis., 612 (103 N. W. 251). Com. v. Wood, 142 Mass. 459 (8 N. E. 432.) Without deciding this question, which we regard largely a moot one, it is enough to say that our statute was borrowed from New York, and under the decisions in that State construing this statute the district court of Polk county had jurisdiction. See people v. Dimick, supra .....

Affirmed.

State v. Hengen.

Supreme Court of Iowa, 1898. 106 Iowa 711, 77 N.W. 453.

From a judgment of conviction of the crime of embezzlement, the defendant appealed.

Ladd, J. The evidence tended to show that Pattee, as manager of the installment house of W. A. Edwards of Des Moines, in Polk county, and the defendant, there entered into an oral contract by the terms of which the latter agreed to travel and sell goods for Edwards in certain counties of Iowa other than Polk, and to account or report to Edwards at Des Moines by mail every Saturday night, and inclose therewith the leases taken for goods sold or cash received therefor. These leases ran from Edwards to the purchaser, permitted payment in installments, and were conditioned that title should not pass until the price was fully paid. Some of the goods were delivered by Pattee to the defendant at Des Moines; others - and most of them - were shipped to him in Dallas, Boone, and Carroll counties, and from these localities he made reports at different times. The general agent demanded an accounting in Carroll, and also in Dallas county. This the

defendant failed to make, and insisted on making settlement with Pattee at Des Moines. When he reached Des Moines, he was unable to account for the property received. The evidence tends to show that he appropriated goods of Edwards, delivered or sent to him, valued at two hundred and thirteen dollars. If it be conceded that the goods were delivered by Edwards to the defendant as his agent in Polk county, or were sent from there to him elsewhere, and upon the agreement that he was to account for them to Edwards, in Polk county, and he failed to do so when this was demanded, and it appears that he fraudulently converted the same to his own use by selling and appropriating the proceeds in some other county had the district court of Polk county jurisdiction to try him for such offense? In other words, was the venue properly laid in Polk county? Our statute provides that "when a public offense is committed partly in one county and partly in another, or when the acts or effects constituting or requisite to the consummation of the offense occur in two or more counties, jurisdiction is in either county, except as otherwise provided by law." Code, section 5 157. The venue can always be laid in the county where the conversion actually took place, but it is often as difficult to determine where as it is when that happened. This is especially true of an agent who travels as salesman from town to town through several counties. The authorities agree that, if the transaction constituting the offense extends through different counties, that in which the conversion took place has not the exclusive jurisdiction. 1 Bishop Criminal Procedure, 61; 7 Enc. Pl. & Prac. 412. But, unless some essential element constituting the crime of embezzlement occurred in Polk county, the venue could not properly be laid therein. The establishment of the contract creating the fiduciary relation, and the duty to account for the property received, is quite as necessary for conviction as proof of the conversion. In Reg. v. Murdock, Dennison & P., Crown Cas. 298, money was received by the accused in Derbyshire, though both parties lived at Nottingham. Upon inquiry concerning the money at the latter place, Murdock admitted having spent it, and the venue was held to be there; Talfourd, J., remarking: "My opinion is, the offense was completed when the prisoner refused to account to his master at Nottingham." In Reg. v. Rogers, 3 Q. B. 28, the sending of a letter by the defaulting employe, in effect denying the receipt of the money from another county, where he had collected it, to his employers, and its receipt by them in that in which it was his duty to account, and where both resided, gave jurisdiction in the latter county. In these cases the judges assigned different reasons for their conclusion, and, in the last, Huddleton, B. dissented. The demand and refusal must be regarded, however, only as evidence of conversion, and not essential to constitute the crime. State v. Brooks, 85 Iowa, 366; Hollingsworth v. State, Ill. Ind. 289 (12 N. E. Rep. 490); State v. Mims, 26 Minn. 191 (2 N. W. Rep. 492). If this were not so, the offender might prevent the completion of the offense by flight. And it follows that, if the conversion is made complete by the appropriation of

the property in one county, the mere demand and refusal would not add to it in any way, and thereby aid in conferring jurisdiction in the place of such demand. If there were no evidence of such a conversion elsewhere, it might be inferred to have been at the place where the demand is made, in event the duty to there account existed. Reg. v. Murdock, supra; Campbell v. State, 35 Ohio St. 70. In the last case the defendant was shown to have had the money of his principles in the county where it was his duty to account, and the fact that he expended it in another county was held to be no defense. In State v. Bailey, 50 Ohio, 636 (36 N. E. Rep. 233) the defendant was employed by Hood Bros. Co., in Toledo, Lucas county, to sell goods for cash or on the installment plan in Fremont, Sandusky county, but to report in person or by letter to the firm at Toledo at the end of each week. Part of the goods were delivered to him in Toledo, and others sent to him at Fremont. After working some time, he caused a letter to be written and mailed to them, saying his sales were small; he was discouraged, but would await their further orders. He had sold the goods on hand, and spent part of the proceeds there, and afterwards the remainder in Buffalo, N. Y., to which place he immediately absconded. The court, in holding the venue to be in Lucas county, said, through Bradbury, C.J.: "It is the defendant's duty to account, together with his neglect or refusal to do so, that constitutes the fraudulent breach of duty. A demand at a place when and where he owes no duty is, of itself, not enough. The defendant's obligation was to account to his employers at Toledo, in Lucas county. This obligation pressed upon him with equal force whether he was within or without the county. His refusal, neglect, or omission to discharge this duty may be as clearly manifested by silence and the circumstances of his absence, or by letter, as by spoken words, unless there is some magic in personal presence. That the presence of the offender within the county when a crime is committed is not always necessary to give jurisdiction is a settled principle. Norris v. State, 25 Ohio St. 217. The question is by no means free from difficulty, but we think the weight of authority, as well as of reason, authorizes us to hold that the making of the contract in Lucas county, the express duty it imposed upon the defendant to account weekly to his employer there, either in person or by letter, together with the fact that he did report to them falsely by letter, which they received, constituted such integral and essential parts of the transaction as entitle venue to be laid in Lucas county." The case at bar is like that from which we have quoted, and we are inclined to follow it. The defendant lives in Polk county, where the contract was made, and from whence he received the property. He agreed to account to his employer at Des Moines. His failure or neglect or refusal to do so elsewhere would not amount to conversion, for he owed no such duty to his employer. That he fully realized this was shown by his insistency on settling with Pattee at Des Moines. Whether there or elsewhere, his obligation to

account for the property at that place continued, and his failure to do so when then requested at that place was a clear breach of duty he owed to his principal. The existence of the contract, and the breach of the particular duty it imposed, were essential elements of the transaction constituting the embezzlement. See 7 Enc. Pl. & Prac. 412; State v. Small, 26 Kan. 209; State v. Whiteman, 9 Wash. 402 (37 Pac. Rep. 659); McClain Criminal Law, section 650. We do not overlook the case of People v. Murphy, 51 Cal. 376, announcing a contrary rule, but deem that adopted as having better support in authority and reason.
The judgment is Affirmed.

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Section 4

Courts.

Having determined the county in which the accused may be tried, the final inquiry in the matter of jurisdiction is to determine which one of the tribunals sitting in that county is the proper one in which to institute this prosecution. (For a discussion of the superior court see Page v. Millerton (1901), 114 Iowa 378, 86 N. W. 440. The Municipal court is considered in Model Laundry Co. v. Barnett (1917) 180 Iowa 55).

Orton v. State

Supreme Court of Iowa, 1853. 4 Greene 140.

The opinion states the facts.

Opinion by Greene, J. Orton was indicted for an assault upon Terrel, and on trial found guilty. It is now contended that several errors were committed below in the progress of the trial.

.....

2. It is claimed that the court erred in overruling defendant's motion in arrest of judgment. In support of this motion, it is urged, that the court altered the verdict of the jury.

It appears by the bill of exceptions that the jury returned the following verdict: "We, the jury, find the defendant guilty of the second charge in the indictment." The court, on receiving the verdict, said, "Gentlemen, let us understand this verdict; you find on the simple assault?" The jury assented. Thereupon the court added to the verdict, in the presence of the jury, the following words, "the simple assault."

As the second count in the indictment charges a "simple assault" only, the verdict of the jury justifies the assumption that they found the defendant guilty on the second count in the indictment. The judgment in the case is in harmony with this view of the verdict. The words added to the verdict in the presence of the jury were in accordance with their explanation of the verdict. The addition of those words was justifiable. They did not change; they simply explained the intention and meaning of the verdict. Where a jury return to the court an informal or ambiguous verdict, it is the duty of the court to have it corrected in form, or have the ambiguity explained by the jury, at any time before they are discharged. Wright v. Phillips, 2 G. Greene, 191.

3. But it is objected that a simple assault is not indictable, as the offense is cognizable before a justice of the peace. Code, § 3322 Although justices of the peace have jurisdiction

over such offenses, it does not, therefore, follow that the district court is divested of such jurisdiction. In such a case the jurisdiction is concurrent.

The Code provides that the district court shall exercise general jurisdiction, both civil and criminal, "when not otherwise provided by law," § 1575. That jurisdiction can be taken away only by express words. Wright v. Marsh, 2 G. Greene, 94.

Under the constitution, the district court has jurisdiction in all civil and criminal matters arising in their respective districts. See art. 5, § 4. The general and concurrent extent of that jurisdiction has been repeatedly before this court. Chapman v. Morgan, 2 G. Greene, 374; Nelson v. Gray, ib., 397; Hutton v. Drebilbis, ib., 593.

The indictment contains three counts, in each of which an indictable assault is charged, under which a simple assault might be included. A defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment. Code, § 3039. A simple assault is necessarily included in the charge of an assault, with intent to commit a bodily injury, and therefore the defendant might have been found guilty under either count.

Judgment affirmed.

State v. Burdick.

Supreme Court of Iowa, 1859. 9 Iowa, 402.

A demurrer to an indictment for assault and battery having been sustained, the state appealed.

Wright, C. J. - The grounds of demurrer relied upon are, that the offense charged is not indictable, and that the law under which the indictment was found, is repealed.

The constitution, which took effect September 5, 1857, provides that all offenses less than felony, in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days, shall be tried summarily before a justice of the peace, on information under oath, without indictment. (Section 11, Art. 1.) By the Code, section 2597, the offense here charged, was punished by imprisonment in the county jail, not exceeding six months, or by fine not exceeding two hundred dollars, or both

such fine and imprisonment, at the discretion of the court. The punishment clause in this section was changed by section 1, chapter 50, Laws 1858, so as to read, "by imprisonment in the county jail not more than thirty days, or by fine not exceeding one hundred dollars." This last act took effect July 4, 1858. Held, that there being no saving clause in the act of 1858, as to offenses committed prior, or prosecution then pending, the District Court had no power to hear and determine the cause, but that the same should be heard "summarily before a justice of the peace on information under oath." State v. Rollet, 6 Iowa 535; Walters v. State, 5 Iowa 507.

Judgment affirmed.

State v. Ford

Supreme Court of Iowa, 1913. 161 Iowa 323.

The facts are stated in the opinion.

Ladd, J. - The accusation against D. D. Ford and John Pumroy is the "violation of Code, section 2419, in conveying such liquor to one not a permit holder"; the liquor previously having been described as intoxicating. The charge is not specific, but the sufficiency of the information is not questioned. The particular offense was in carrying, as employees of a drayman, three cases of beer shipped by H. Brew Company from Rock Island, Ill., via the Chicago, Milwaukee & St. Paul Railway Company, to three persons at Ottumwa, Iowa; the defendants having procured the said cases from the railroad company at its depot by virtue of the order of the consignees. The defendants were acquitted in the police court and the property ordered returned. On appeal by the state, the district court affirmed the decision, holding in effect that under the so-called Wilson Act the liquors had not so arrived in Iowa as to render these subject to its laws. See, as bearing thereon, Louisville Ry. Co. v. F. W. Cook Brewing Co., 223 U. S. 70 (32 Sup. Ct. 189, 56 L. Ed. 355); State v. Wignall, 150 Iowa, 650; State v. Intoxicating Liquors, 106 Me. 138 (76 Atl. 265, 29 L. R. A. (N. S.) 745, 20 Ann. Cas. 668); Gulf, etc., C. F. Ry. Co. v. State, 28 Okl. 754 (116 Pac. 176, 35 L. R. A. (N.S.) 456); State v. 18 Casks of Beer, 24 Okl. 786 (104 Pac. 1093, 25 L. R. A. (N.S.) 492); State v. Kirmeyer, 88 Kan. 589 (128 Pac. 1114).

The jurisdiction of the district court to entertain the appeal by the state was challenged and the question is again raised in this court. Unless the cause was appealable from the police to the district court, this court could acquire no jurisdiction, and of course, if the district court was without

authority to entertain the appeal, the power of review might not be conferred by consent or waiver, though the state has so argued, and the mere fact that the defendants did not appeal from the order overruling the motion to dismiss in the district court would not prevent them from raising the question here. It is elementary that jurisdiction may be challenged at any stage of the proceedings.

The appeal is Dismissed.

State v. Kinney.

Supreme Court of Iowa, 1875. 41 Iowa 424.

"Defendant was arrested upon an information charging him with the offense of assault and battery, and brought before a justice other than the one issuing the warrant. Upon an affidavit for a change of venue the cause was sent back to the first justice, who, being unable to try the cause, sent it to a third justice; all of these justices were of the county in which the offense was committed. The defendant pleaded not guilty, and made no objection to the jurisdiction of the last mentioned justice; upon a trial before that officer he was convicted and fined. Upon appeal to the district court the case was dismissed on the ground that the justice trying it had no jurisdiction thereof. From this order the state appeals."

Beck, J. - The order of the district court dismissing the case was erroneous.

The jurisdiction of justices of the peace is co-extensive with the county. Code, § 4660. The justice trying the cause acquired jurisdiction therein by defendant having been brought into his court and submitting, without objection, to be tried there.

If there was any error or irregularity in taking defendant before the justice rendering the judgment, which we do not determine, it was waived by the failure to raise objection founded thereon at the proper time. Objections upon such grounds cannot be first made upon appeal in the District Court.

Reversed.

CHAPTER II

STATUTE OF LIMITATIONS

With regard to limitations as to time, it is one of the peculiarities of English law that no general law of prescription in criminal cases exists among us. The maxim of our law has always been 'Nullum tempus occurit regi', and as a criminal trial is regarded as an action by the King, it follows that it may be brought at any time. This principle has been carried to great lengths in many well-known cases. In the middle of the last century Aram was convicted and executed for the murder of Clarke, fourteen years after his crime. Horne was executed for the murder of his bastard child (by his own sister) thirty-five years after his crime. In 1802 Governor Wall was executed for a murder committed in 1782. Not long ago a man named Sheward was executed at Norwich for the murder of his wife more than twenty years before; and I may add as a curiousity that, at the Derby Winter Assizes in 1863, I held a brief for the Crown in a case in which a man was charged with having stolen a leaf from a parish register in the year 1803. In this instance the grand jury threw out the bill." (2 Stephen's History of the Criminal Law of England,1)

But although this was true at common law, statutory limitations of the time in which prosecutions may be instituted, are quite general. It should be borne in mind that such statutes are acts of grace and hence are not governed by the same rules of construction as are applied to ordinary statutes which change the common law rules of crimes and punishments.

Brightman v. Hetzel.

Supreme Court of Iowa, 1918. 183 Iowa 385.

The facts are omitted.

Gaynor, J. - .....

In City of Waterloo v. Union Mill Co., 72 Iowa 437, the doctrine was recognized that the statute of limitations will not run to defeat the exercise of governmental powers. It rests upon the doctrine that individuals may be held to a time limit in the enforcement of their rights against adverse claimants. This is because they have sufficient interest to make them vigilant. But in public rights, each individual feels but slight interest, and would rather tolerate even a manifest encroachment than to seek a dispute to set it right. The people do not act in a body. The agents of the government, experience shows, do not manifest the same degree of diligence in detecting and protecting public rights that individuals evince in the protection of their own rights. Some

courts hold that the statute of limitations cannot be invoked to deprive the people of their right in public easements. A public easement belongs to the public, and all individuals are charged with knowledge of this fact. Any encroachment upon the public right is a wrong at the very beginning, and continues a wrong, and can form no basis for an estoppel against the public. See Taraldson v. Town of Lime Springs, 92 Iowa 187; Chicago, R. I. & P. R. Co. v. City of Council Bluffs, 109 Iowa 425; Dickinson County v. Fouse, 112 Iowa 21; Biglow v. Ritter, 131 Iowa 213; Quinn v. Baage, 138 Iowa 426. In this last case, it is said:

"Though the authorities are in conflict on the question (to wit, the statute of limitations), this court is committed to the doctrine that, in establishing and maintaining a highway, a municipality exercises governmental functions, and for this reason the statute of limitations does not run against it with respect to encroachment therein."

State v. Disbrow.

Supreme Court of Iowa, 1906. 130 Iowa 19, 106 N.W. 263.

From a conviction of the crime of larceny by embezzlement, the defendant appealed.

Weaver J. - .....

III. The indictment appears to have been framed with the purpose of charging an offense under Code, section 4842, which enumerates several classes of employes, agents, and bailees whose fraudulent conversion of money or property intrusted to their keeping is made punishable as embezzlement. This section does not expressly mention guardians as being subject to the penalties there provided, and whether they are fairly included within the general terms of the statute is a question on which the authorities are not in unison. Myers v. State, 4 Ohio Cir. Ct. R. 570; State v. Henry, 69 Tenn. 720; State v. Meyer, 23 Wkly. Law. Bul. (Ohio) 251; Com. v. Butterick, 100 Mass. 1 (97 Am.Dec. 65); State v. Gillis, 75 Miss. 331 (24 South. 25); State v. Whitehouse, 95 Me. 179, (49 Art. 869). The case as presented does not require us to construe the statute in this respect, and is one of too much importance to be definitely decided without the assistance of argument by counsel upon both sides.

The same section of the statute also provides that, where the fraudulent conversion or embezzlement of money is accomplished by a series of wrongful acts done in course of the same

employment, they are to be considered as if all were done at the same time. Whether this clause is applicable to a charge of the nature of the one here involved, and, if so, its effect upon the application of the statute of limitations is by no means clear; but, as said with reference to the question last referred to, it is probably not essential to the disposition of this appeal that we stop to consider it. The trial court adopted the theory that each act of the accused in fraudulently converting the trust fund or any part of it to his own use constituted an independent offense, and that as to each the statute of limitations began to run at the date of the act. This is also the theory of the appellant, and must therefore be regarded as the law of the case for the purposes of this appeal.

It will be recalled from the preliminary statement of facts that prior to the presentation of the indictment herein another indictment had been returned against appellant on the same charge and set aside as defective and the matter resubmitted to the grand jury. The date of said prior indictment was September 14, 1904. Now, as the evidence on the trial showed quite conclusively that appellant converted the trust fund to his own use in several items or amounts and at various times extending over a period of about six years from 1896 to 1902, and as the statutory limit for criminal actions of this nature is but three years, it was a matter of importance to the appellant that the jury should be correctly instructed as to the period within which he could be held criminally liable for his acts. The instructions given directed the jury that such liability included all fraudulent conversions by the accused within three years prior to the return of the first indictment September 14, 1904. This ruling is assigned as error, it being the contention of the appellant that he can only be held liable for such embezzlements, if any, as were committed by him within three years prior to the date of the indictment on which he was tried, January 19, 1905. We are of the opinion that this contention must be sustained. Limitation of the time beyond which an action will not be maintained is purely a matter of statutory enactment, and precedents cited from other jurisdictions are of little assistance, unless it also appears that the statutes there considered are of like form and effect with our own. Our statute (Code, section 5165) provides that an indictment in this class of cases must "be found within three years after the commission of the offense and not afterwards." In some of our sister States the corresponding provision is that "prosecution must be begun" within the stated limit. The beginning of a prosecution and a finding of an indictment are not equivalent expressions. A prosecution is begun when an information is filed before a magistrate and a warrant issued for the defendant's immediate arrest. An indictment is found when it is presented by the grand jury in due form in open court and filed with the clerk. This distinction has been widely, though perhaps not universally, recognized, Com. v. Woodward, 1 Chest. Co. Rep. (Pa.) 102; Boughn v. State, 44

Neb. 889 (62 N. W. 1094); Com. v. Dunn (Pa.) 1 Leg. Op. 114; United States v. Slacum, Fed. Cas. No. 16,311; Ex parte Lacey (Okl.) (37 Pac. 1095); Com. v. Hass. 57 Pa. 443.

The language of the statute is too clear for construction, and, without reference to the time when the proceedings were begun, the indictment must be found within three years from the commission of the offense, and not afterward.

It is said, however, on the part of the State, that even if this be true it is settled law that "the time during which an indictment which has been quashed or set aside was pending is not, in case a new indictment is found, computed as a part of the period of limitation, provided the same offense and the same offender are charged in both indictments." We find this general proposition stated in some of the text-books and cyclopedias; but reference to the cases relied upon, so far as we have been able to examine them, reveals in each instance that the decision turns upon a local statute expressly or impliedly providing that upon the setting aside of an indictment or the entry of a nol. pros. the right of the State to present a new indictment within a limited time shall not be prejudiced. Swalley v. People, 116 Ill. 247 (4 N. E. Rep. 379); State v. Dunham, 9 Ala. 76; Stafford v. State, 59 Ark. 415 (27 S. W. Rep. 495); State v. Child, 44 Kan. 420 (24 Pac. Rep. 952); State v. Hailey, 51 N. C. 42.

It seems to us a reasonable and just proposition that, in the absence of any statute saving such right to the State, the running of the statute of limitations ought not to be interrupted or suspended by the return and pendency of an indictment upon which no valid conviction or judgment can be founded. Such an indictment is no indictment. It is a nullity, and while it may serve as authority for the trial court to continue the defendant in custody and cause a resubmission of the case to the grand jury, such order is in effect the mere direction that the original inquiry shall be resumed as if the defective indictment had never been voted or returned into court. It is no more than a restoration of the case to the status it occupied at the time it was originally submitted. The grand jury takes it up anew, and may present or ignore the bill, without any reference whatever to the fact that one indictment has been presented and set aside. Cases are not wanting which tend to sustain this view. United States v. Ballard, Fed. Cas. No. 14,507; State v. Curtis, 30 La. Ann. 1166; Com. v. Keger, 62 Ky. 240; Newport News & M. V. R.R. Co. v. Commonwealth, 14 Ky. Law. Rep. 197. But, without reference to the precedents from other States, our statute admits of no other conclusion than the one we have indicated.....

Reversed.

State v. Soper.

Supreme Court of Iowa, 1902. 118 Iowa 1. 91 N.W. 774.

McClain J. - .....

II. Another ground of demurrer was that the indictment on its face showed that it was not found within the statutory period of limitation, which, as to the crime of conspiracy, is three years. Code, section 5165. But Code section 5167, provides that "no period during which the party charged was not publicly resident within the state is a part of the limitation," and it is alleged in the indictment that "since the commission of the aforesaid crime..... the defendants have been nonresidents and lived beyond the limits of the state of Iowa more than one year." As the indictment was found less than four years after the date of the conspiracy as charged in the indictment, this allegation is sufficient to take the case out of the statute, and bring it within the exception of Code, section 5167, unless it is to be said that while one is a nonresident of the state and living beyond its limits he may nevertheless be publicly resident within the state. We think it evident that by any reasonable interpretation the language used in the indictment must be held to plainly negative public residence within the state, and therefor that this objection was not well taken .....

Affirmed.

State v. Hussey.

Supreme Court of Iowa. 1858. 7 Iowa 409.

Wright, C.J.- .....

The objection that the prosecution was barred by the statute of limitations, could not be made by demurrer. If, after the offense was committed, there was any period during which the party charged, was not usually and probably a resident within the State, such period is not to be taken as a part of the limitation. Code, section 2314. Such non-residence need not, however, be stated in the indictment. If the defendant relies upon the bar of the statute, he should plead the same, to which the State might reply the non-residence, and thus raise the issue.

For this reason, then, without stating others, we think the demurrer was properly overruled.....
(On other grounds the judgment was)

Reversed.

State v. Whalen.

Supreme Court of Iowa, 1896. 98 Iowa 662, 68 N. W. 554.

Robinson, J. - .....

V. The indictment was found on the seventeenth day of January, 1895. The defendant stated, as a witness, that he had sexual intercourse with the prosecutrix in the year 1891; and in some of her answers she stated that the time of the seduction was September 29, 1892, although she afterwards corrected the statement, and said the year was 1893. During the time the state was introducing its evidence, the defendant offered an instrument, of which the following is a copy: "Comes now the above named defendant, and specially pleads that this prosecution is barred by the statute of limitations, and asks the court to charge the jury that if they have reasonable doubt whether the offense charged in the indictment was committed within eighteen months prior to the seventeenth day of January, 1895, if committed at all, they must acquit defendant." The court refused to allow the paper to be considered as a plea, but, in the charge which it gave, instructed the jury that, if the offense charged was committed eighteen months or more before the finding of the indictment, the defendant could not be convicted. The appellant contends that the court erred in not permitting him to plead the bar of the statute, and relies upon the cases of State v. Hussey, 7 Iowa, 409, and State v. Groome, 10 Iowa, 312. The first of these cases held that a defendant who relies upon the bar of the statute should plead it; and the other, that it could not be raised by demurrer, by instruction, or motion for a new trial, but should be specially pleaded. Neither of those cases was decided under existing statutes, but under the Code of 1851. Section 2957, of that Code, provided that: "There are three kinds of pleas to an indictment, which may be pleaded by the defendant: First, guilty; second, not guilty; third, a former judgment of conviction or acquittal of the offense charged in the indictment. ..... "In section 4714, of the Revision of 1860, and in section 4359, of the Code of 1873, the language is, "There are but three pleas to an indictment" (naming the same as those given in the Code of 1851). The sentence, "There are three kinds of pleas," is more comprehensive than, "There are but three pleas," and the change from the former to the latter, indicates a legislative intent to exclude all pleas not specified. This conclusion is strengthened somewhat by section 4715, of the Revision, now section 4360, of the Code, which prescribes a form for each of the three pleas allowed. It is further strengthened by the enactment in the Revision of section 4655, continued in the Code of 1873, as section 4301, which is as follows: "The precise time at which the offense was committed, need not be stated in the indictment, but it is sufficient if it allege that the offense was committed at any time prior to the finding thereof,

except when the time is a material ingredient in the offense." It is not necessary, under this provision, to prove when an offense was committed, if time is not a material ingredient of it. State v. Moore, 78 Iowa, 495 (43 N. W. Rep. 273), and cases therein cited; State v. Deitrick, 51 Iowa, 471, (1 N. W. Rep. 732). If the evidence shows that the offense was committed within such a time prior to the finding, the indictment that the action is not barred, it is sufficient, and it is the well settled and authorized practice to instruct the jury within what time the crime charged must be proven to have been committed, in order to warrant a conviction. The plea tendered in this case, to the effect that the prosecution was barred by the statute of limitations, was neither necessary to a presentation of that defense, nor authorized. The court rightly charged the jury in regard to the time within which the alleged offense must have been committed to authorize a verdict of guilty, and that was sufficient.

.....

Affirmed.

State v. Hutchinson.

Supreme Court of Iowa, 1883, 60 Iowa 478, 15 N.W. 298.

From a conviction of embezzlement, the defendant appealed.

Rothrock, J. - The defendant was Treasurer of Webster county for ten years, commencing in January, 1868, and ending in January, 1878. In April, 1878, the indictment in this case was returned against him, in which he was charged with embezzling about $46,000 of the public money which came into his hands as such treasurer.

The State introduced in evidence the settlement sheet which was made at the commencement of the defendant's last term of office, in January, 1876, with his certificate thereon that it was a true statement of cash then in his hands as treasurer. The account or settlement sheet embraced the transactions of the office for the six months next preceding the settlement, and upon its face it appeared to be correct, and the defendant was thereby shown not to be in arrears. The State then followed up this showing by an exhibit of the subsequent semi-annual settlement sheets, and then from the books of the office for the last six months of the last term ending in January, 1878. Upon this basis it appeared that at some time during the last term of office the defendant became short in his cash some $46,800.

We do not understand that the defendant contended upon the trial that he was not short in his cash, and largely in arrears, when he went out of office in January, 1878. But he sought to

show that this shortage occured during his prior terms, more than three years before the indictment was found, and that, therefore, the prosecution was barred by the statute of limitations. To make this proof, the defendant offered evidence to the effect that at the settlement made in January, 1876, and at those previously and subsequently made, but a small amount of cash was produced at each settlement, and that the cash balance, which should have been actually in his hands in money, were largely made up of bank certificates of deposit and other vouchers. He offered to show that certificates of deposit and other evidences of debt had been made use of by him in his settlement, more than three years prior to the finding of the indictment. He further offered to prove that he had no funds in the banks which issued the certificates. In other words, he offered to show and prove that he made his settlement with the board of supervisors by the use of worthless and spurious certificates of deposit, instead of cash, and that whatever money was converted to his own use was so converted more than three years before the indictment was presented. This evidence was objected to by the State, and the objection was sustained. This ruling, as we infer from the objections made to the evidence, was based upon the idea that the defendant was criminally bound by the settlement sheets, and by his certificates, that he had the cash actually on hand at the time the several settlements were made.

In Boone County v. Jones, 54 Iowa, 699, it was held that a county treasurer, and the sureties on his bond, were bound by a settlement and accounting made according to law, and where, at such settlement, for aught that appeared, the cash which should have been on hand was produced by the treasurer, such settlement could not be impeached by showing that the defalcation complained of previously existed. In other words, it was held that, where a treasurer produces the funds which should be in his hands, at a settlement, the settlement is conclusive, and the treasurer and his sureties cannot be permitted to prove that the treasurer deceived the board of supervisors in such settlement, by producing money not belonging to the office nor to the treasurer. That was a civil action to recover upon the bond of the treasurer for an alleged defalcation. In Webster County v. Hutchinson, 9 N. W. Rep., 901, and 12 N. W. Rep., 534, which was a civil action to recover on the defendant's bond for the same alleged defalcation for which the defendant was indicted in this case, it appeared that the settlement was made with the treasurer without producing the money which should have been on hand, but by producing certificates of deposits from banks, and other evidences of indebtedness. It was held that this constituted no settlement, because the law required the cash to be produced. It was further held that, as the board of supervisors were not deceived by the production of the money, it was allowable for the sureties upon the defendant's bond to show that the defalcation existed in fact prior to the settlement in question. It was also held, in that case, that the defendant was concluded, by the settlement, upon the very obvious ground that he could not be allowed to take advantage of his own wrong and fraud, to the injury of the public, even though the board of supervisors knew that the settlement was not made in compliance with the law.

We are now required to determine whether or not the above rules, which are applicable to civil liability upon a treasurer's bond, should be held to obtain in a criminal prosecution for embezzlement. We are clearly of the opinion that they should not. If the claim of the defendant be true, he was guilty of embezzlement as early as 1872. He offered to prove that, from that time forward, he made his settlements, not with money, but largely with certificates of deposit, and with other promises to pay. This was wholly unauthorized by law. Even if the defendant had actually deposited money with the banks, and the certificates represented the deposits, such a disposition of the funds in his hands was unauthorized, Lowry v. Polk County, 51 Iowa, 50. But when the defendant offered to prove that he had no deposits in the banks, he, in effect, offered to show that he had converted the money which had been in his hands to his own use. At least, this would have been the logical inference, in the absence of proof that he had lost it, or that it had been stolen, or the like. The fact that at each settlement he failed to produce the money, was a sufficient failure to account for the funds in his hands, to constitute the crime of embezzlement, in the absence of exculpatory proof.

We think the defendant should have been allowed to show, if he could, that no defalcation took place within three years next before the finding of the indictment. We know of no rule that estops a defendant in a criminal prosecution from proving the actual fact in dispute, notwithstanding any admission or confession he may have made to the contrary. Conclusive presumptions and estoppels have no place in the criminal law in establishing the body of the crime charged. The statement and certificate showing that the cash was actually on hand and produced at the settlement in 1876, amounted to no more than an implied confession that the defalcation took place after that time, and to deny to the defendant the right to dispute the confession thus made is, in our opinion, fundamentally wrong.

II. There are other questions in this case which are argued by counsel. They pertain to the manner of obtaining the jury, and the empaneling the jury in the alleged absence of any counsel for the defendant, and other objections, which we need not discuss, inasmuch as the alleged errors will not likely arise upon a retrial. In view of a new trial, however, it may not be improper to say that, in our opinion, the demand made by the county auditor (if a demand was necessary) for the payment of the alleged shortage, was a sufficient demand, in view of the authority given to him by the board of supervisors.

For the error first above discussed the judgment of the District Court will be

Reversed.

CHAPTER III

FORMER JEOPARDY

It is stated by Blackstone (4 Comm. 355) to be a "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offence." This is not entirely covered by the provision of the Constitution of Iowa (Article 1, section 12) that "no person shall, after acquittal, be tried again for the same offense"; but by statute (Code of '97, section 5339) it is provided that "a conviction or acquittal by a judgment upon a verdict shall bar another prosecution for the same offense, notwithstanding a defect in form or substance in the indictment on which the conviction or acquittal took place." It is added by the two following sections that "when a defendant has been convicted or acquitted upon an indictment for an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment for the offense charged in the former or for any lower degree of that offense, or for an offense necessarily included therein"; and "except where otherwise provided, the judgment for a defendant on a demurrer, or on an objection to its form or substance taken on the trial, or for variance between the indictment and the proof, shall not bar another prosecution for the same offense, if a resubmission has been ordered." The provision of another section (5333) that one of the three pleas to an indictment is that "of a former judgment of conviction or acquittal of the offense charged," merely states in simple English what were anciently known as the pleas of autrefois acquit and autrefois convict.

But "a defect in the form or substance in the indictment" is not to be confused with the problem of jurisdiction, and if "the former conviction was by a tribunal without jurisdiction" the plea of former conviction will not be good. State v. Jamison (1898) 104 Iowa 343, 73 N. W. 831. Moreover the provision as to a defect applies only if there has been a judgment upon a verdict thereunder. If, because of the defect, the indictment is quashed before trial (Reddan v. State (1853), 4 G. Greene 137) or set aside during the trial, the defendant may be prosecuted upon a proper indictment subsequently found against him. State v. Smith (1893), 88 Iowa 178, 55 N. W. 198. But where a defendant is placed upon trial on an indictment which is not defective, "it is not within the scope of authority of either the attorney for the state, or of the court, to take the case from the jury, of their own arbitrary will, and without a peremptory and controlling cause, and again hold him to trial on the same charge, although it be newly presented; and such a proceeding amounts to an acquittal, and may be pleaded as such." State v. Callendine (1859), 8 Iowa 288. This does not mean, of course, that when the trial is once begun it can under no circumstances be taken from the jury. For example, the discharge of a jury that is unable to agree upon a verdict "is a matter of sound discretion, and presents no impediment to a second trial." State v. Vaughan (1870), 29 Iowa 286.

The rule is that after an acquittal or conviction the accused shall not be again tried for the same offense - not that the same act shall never subject a man to more than one trial. Hence it is significant that "the same act may constitute an offense against both the State and the municipal corporation, and may be punished under both without a violation of any constitutional principle." Town of Bloomfield v. Trimble (1880), 54 Iowa 399, 6 N.W. 586, 37 Am. Rep. 212. In like manner the same act may constitute an offense against the United States while also being a crime under the laws of Iowa, so that the trial, conviction and punishment of the defendant under the federal statutes for breaking and entering a postoffice with intent to commit larceny is no bar to a subsequent prosecution by the state for burglary under an indictment which charges the same state of facts. State v. Moore (1909), 143 Iowa 240.

Where the defendant, on appeal, secures a reversal of a judgment of conviction because of error in the proceedings in the court below, he may be tried again. State v. Rhouse (1871), 33 Iowa 365. It is said that "jeopardy is not considered as having attached if the defendant is erroneously convicted and obtains a reversal of the judgment." But if the defendant was convicted of an offense which is included within a greater offense with which he was charged in the indictment, the conviction of the lesser amounts to an acquittal of the greater, so that "a defendant who has been tried on an indictment charging murder in the first degree and convicted of manslaughter only, cannot be again tried for the graver offense" State v. Walker, (1907), 133 Iowa 489.

Former jeopardy applies only when there has been a real prosecution for crime. If a wrongdoer, not having been accused, hastens before a magistrate, confesses to having committed a certain offense and pays the fine imposed, the state is not barred from a subsequent prosecution. Such voluntary confession and payment of fine is not a criminal prosecution (State v. Bartlett (1917), 181 Iowa 437).

State v. Redman.

Supreme Court of Iowa, 1864, 17 Iowa 329.

What was intended to be a verdict of guilty was rendered against the defendant in a former trial of the same offense, but was set aside on "account of informality", over the defendant's objection. These facts were pleaded by the defendant in bar, but a demurrer to this plea was sustained by the court. The defendant appealed.

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Dillon, J. - .....

In general, it may be said that jeopardy begins when a trial jury, upon a sufficient indictment, in a court of competent jurisdiction, has been impaneled and sworn to try the cause. Bish. on Cr. Law § 659; 2 Lead, Cr. Cas., 358. But the jeopardy is not considered as attaching in such cases, although the jury has been sworn, if during the trial the presiding judge becomes so ill as to be unable to proceed (Nugent v. The State, 4 Stew. & Port., 72); or if a juror's illness prevents him from sitting further on the trial (King v. Scalbut, 2 Leach, 620; United States v. Haskell, 4 Wash., 402; Rev., § § 4804, 4820); or if the prisoner's sudden illness incapacitates him from attending or managing his defense (King v. Stevenson, 2 Leach, 541); or if the jury, after full deliberation, are unable to agree (Rev., § 4821, 4822); or if the defendant is erroneously convicted, and obtains a reversal of the judgment. In all such cases he may be put upon his trial again, and cannot claim a discharge or acquittal because a jury has been once before impaneled and sworn to try the cause. And we understand the settled doctrine to be, that where the verdict is a nullity (or so defective that no judgment can be rendered upon it), the defendant may again be put upon his trial, certainly where the verdict was intended to be one of conviction, for in such case it is rather a mistrial than a legal putting in jeopardy. 1 Bish. Cr. Law, § 673.

Thus it has even been held, that if the court refuses the constitutional right of the State to a jury trial, and itself tries the defendant at his instance, and acquits him, this is no bar to another trial at the instance of the State, although the State Constitution provides that no person shall be twice put in jeopardy for the same offense. "The reason is," says Blackford, J., who was the organ of the court, "because the defendant, in such a case was not legitimo modo acquietatus." State v. Mead, 4 Blackf., 309. We need not go near this questionable extent to sustain the action of the court below in the case at bar.

So, where it is held that an assault and battery is merged in the felony, and a prisoner, indicted for murder, is found guilty by the jury of an assault and battery, the verdict is a nullity, the defendant is not in jeopardy, the proceeding is a mistrial, and the judgment may be arrested and the defendant again be put upon his trial on the same indictment. Wright v. The State, 5 Ind., 527. If the verdict is insufficient in not properly responding to the whole indictment, and the defendant appeals, the judgment will be reversed and the cause remanded for a new trial. Marshall v. Commonwealth, 5 Gratt., 663; The State v. Moran, 7 Iowa, 236; Wilson v. The State, 20 Ohio, 26; Ray v. The State, supra; Webber v. The State, 10 Mo., 4; The State v. Sutton, 4 Gill., 494. Or, if the verdict is defective and uncertain in not responding to the whole issue, the trial court may itself set it aside and try the prisoner again on the same indictment. Commonwealth v. Hatton, 3 Gratt., 623,

where the prisoner objected to the verdict as imperfect, and the court set it aside and awarded a venire de novo. When the trial was again brought on, he moved "to be discharged, on the ground that having been tried on the indictment, and the court having arrested the judgment on the verdict found, because not sufficient to warrant judgment, he was not liable to be again tried for the same offense;" but it was adjudged that he was thus liable. In Lawrence and Donovan v. The People, 1 Scam., 414, which is in all respects in point, the verdict of guilty was defective under the statute, in not finding the age of the defendant. The court below, on its own motion, set aside the verdict and ordered a venire de novo. Per Smith, Justice; "The only question is on the power of the Circuit Court to set aside a defective verdict on which no judgment could be rendered, and to award a venire de novo. The right to exercise this power cannot be questioned. It has been exercised in numerous criminal cases, and is undoubted." To the same effect, without quoting, see People v. Cloutt, 2 Johns. Cas., 301, the third point decided. Id., 311, per Kent, J.; Rex. v. Keite, 1 Ld. Raym., 138, and Lord Holt's judgment, Rep., 141; S. C. Comberback's R., 406; Commonwealth v. Percavil, 4 Leigh (Va.); 686; The State v. Duncan, 2 McCord, 129, where the Court awarded a new trial on a defective special verdict; 1 Chitty Cr. Law, 641; 1 Bish. Cr. Law, § 673. The State v. Callendine, 8 Iowa, 288, does not conflict with this view. The only doubt which has been raised, is whether the verdict could be set aside, a venire de novo awarded in a capital case. Rex. v. Huggins, 2 Ld. Raym., 1585; and see Rex. v. Burridge, 3 P. Wms., 439, 498. From these cases, and from a general examination of the authorities, we feel safe in laying down this general rule; that where the verdict, especially if intended to be a verdict of guilty, is so defective and uncertain that the court does not know for what offense to pass judgment, it may be set aside by the court, even against the defendant's objection, and the proceeding is no bar to another trial. This is good sense. The defendant, in the case before us, has never been acquitted. The jury did not intend to acquit him. They expressly found him guilty If the court had pronounced judgment against him, and he had appealed the appellate court, under the authorities above referred to, it would not have discharged him, but remanded him for a new trial. It has never been adjudged that, in such a case, he could successfully plead once in jeopardy. The course taken below amounts to the same thing; and is, as we have shown, well warranted by the authorities. We are not unmindful of the rights of persons accused of crime, but do not see how this ruling can ever be used to oppress or unjustly injure them. It accords, moreover, with the letter and spirit of our Code of Criminal Procedure. This has sought to prevent persons convicted of crime, from escaping deserved punishment on refined subtleties and black letter precedents, where no substantial interest or right has been prejudiced. This commendable reform ought not to find an obstacle in the illiberality or the prejudices of the courts. To order, as we are asked to do, upon the facts disclosed in the record, the absolute discharge of the

defendant, would strike any fair mind, untutored in the meaningless technicalities and hair-splitting distinctions, formerly too prevalent in the criminal law, as no less ridiculous and absurd than subversive of the ends of public justice.

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Judgment affirmed.

State v. Spayde.

Supreme Court of Iowa (1899), 110 Iowa 726, 80 N.W. 1058.

Deemer, J. - Defendant was first indicted by the grand jury of Humboldt county. A trial was commenced, a jury impaneled and sworn, the evidence of the state adduced, and the defendant had testified, in his own behalf, that he had affixed the signature to the note which it is claimed was forged in Webster county. Thereupon the court trying the case ordered the jury discharged, and held the defendant to bail to answer to a warrant from Webster county. This action of the court was objected to by the defendant, who insisted that, as there was evidence tending to show that the crime was committed in Humboldt county, he was entitled to a verdict of the jury thereon. The objection was overruled, and from the ruling the defendant appealed to this court. This appeal has not, however, been presented as yet, and with that we have nothing to do, exept in so far as it may affect the further proceedings. Thereafter the grand jury of Webster county returned an indictment against defendant, charging him with the same forgery covered by the indictment in Humboldt county. The trial from which this appeal was taken was held in Webster county upon this second indictment. To that indictment the defendant pleaded not guilty and a former acquittal in the district court of Humboldt county. The jury returned a verdict of guilty, and by a special interrogatory found that the blanks in the note which it is claimed was forged were filled out by defendant in Webster county.

Several matters are presented on appeal, but, as we view the case, it is not necessary to consider all of them. The first point argued is that defendant was placed in jeopardy in Humboldt county, and that the discharge of the jury operated as an acquittal of the offense. There is no doubt that this position is correct, if the district court of that county had jurisdiction of the offense. If it did not have jurisdiction, then the discharge of the jury, and the order holding the defendant to answer to whatever indictment might be presented by the grand jury of Webster county, was authorized by sections 5389 and 5391 of the Code, which provide, in substance, that, if the offense was committed within

the exclusive jurisdiction of another county of the state, the court may discharge the duty, and direct the defendant to be committed for such time as shall be reasonable to await a warrant from the proper county, or, if the offense be bailable, he may be admitted to bail, etc. The pivotal questions, then, are: (1) Did the district court of Humboldt county have jurisdiction of the offense? (2) Was the offense within the exclusive jurisdiction of the district court of Webster county?

At the trial in Humboldt county the state adduced evidence to show that the offense was committed in that county, and the trial court was evidently satisfied when the state rested its case that it had jurisdiction. Defendant then went on the stand testified that he did not sign the name in Humboldt county. Thereupon, on motion of the county attorney, and against the objections of defendant, the court made the order to which we have referred. If the evidence as to venue is undisputed, and that evidence shows, that the court does not have jurisdiction, then it is clearly the duty of the court to discharge the defendant, and it may make the order authorized by the sections of the statute to which we have referred. But if the evidence is in dispute, or if the state has adduced evidence tending to show venue, then the question is for the jury, and the defendant is entitled to their verdict. That rule is peculiarly applicable to the facts disclosed by the record before us. Here, as we have said, there was evidence on the part of the state pending to show jurisdiction in the Humboldt district court, and the only evidence to the contrary on which the court assumed to act was the bare statement of defendant that he did not sign the name "Franklin Rowe" in Humboldt county. That statement may have been absolutely true, and yet the defendant may have been guilty of forging the note in Humboldt county. The evidence shows that the note which it is claimed was forged was partly printed and partly in writing. It had no legal efficacy until the blanks were filled, and the promise given apparent legal effect. Had the defendant signed the name to the printed blank in Webster county, and afterwards filled up the blanks in Humboldt county, there can be no doubt, we think, that he would have been guilty of forgery, and that the venue would have been properly laid in Humboldt county, either because the crime was there committed, or because some of the acts or effects requisite to the consummation of the offense were committed in that county, under section 5157 of the Code. In every criminal case jurisdiction must be shown, and, where there is a dispute in the evidence as to the venue, the jury must determine that dispute, the same as it does any other issue of fact. Had defendant testified, when on the witness stand, that all the acts necessary to make out the offense were committed in another county, it may be (a point however, that we do not decide) that he could not thereafter be heard to say that the court was in error in accepting his evidence and discharging the jury. But that is not the case. Here he testified

simply that he did not sign the name in Humboldt county, and he insisted that, as there was evidence tending to show the jurisdiction of the court, he was entitled to the verdict of the jury on that issue. We think his contention is correct, and that the court of Humboldt county should have submitted the case to the jury.

Under the record, as it is presented to us, the district court of Humboldt county had no authority to discharge the jury, and its act in so doing amounted to an acquittal of the defendant. State v. Callendine, 8 Iowa, 288, and cases cited. State v. Clark, 69 Iowa, 196, is not in point. There the indictment was held insufficient, and in effect set aside.

Some reliance is placed on section 5157 of the Code, which provides that, "when a public offense is committed partly in one county and partly in another, or when the acts or effects constituting or requisite to the consummation of the offense occur in two or more counties, jurisdiction is in either county." The difficulty with this contention is that it is universally held in such cases that the court first taking jurisdiction holds it to the end. In this case the district court of Humboldt county first assumed jurisdiction, and the indictment was not found in Webster county until after the discharge of the trial jury in Humboldt county. Ex parte Baldwin, 69 Iowa, 502; Carter v. Barlow, 105 Iowa, 78.

Again, the Webster county court instructed, in effect, that, if the jury found the offense was committed in Humboldt, then they should acquit, but, if they found it was committed in Webster county, then they should convict; and, in answer to the special interrogatory, they found that the blanks in the note were filled out in Webster county. We do not think there was any evidence justifying this special finding; and, if there was, such finding is by no means conclusive. If the blanks were filled out in Webster county, this would not constitute forgery. At most, it would be nothing more than a finding that the crime was partly committed in that county. The evidence showing the forgery to have been committed in Humboldt county is so strong that any other finding is evidently the result of passion or prejudice, and should not be allowed to stand. It is evident that the trial judge did not regard the finding of the Humboldt county court conclusive on the question of jurisdiction. If not conclusive, then there was the more reason for that court submitting the issue of venue to the jury that had authority to pass upon the question, i.e. the jury impanelled to try the defendant in Humboldt county.

From whatever point of view, it is apparent that the trial court was in error in not sustaining defendant's motion for a new trial. The evidence shows without dispute that he was put in jeopardy in the Humboldt county district court, and his plea of former acquittal should have been sustained.

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It is argued that a confession said to have been made by defendant was not voluntary. There is some conflict in the evidence on this point, and the court submitted that issue to the jury. If there was error, it was without prejudice; for we are of opinion that the evidence shows the confession to have been entirely voluntary. Some other matters are discussed, but it is not important that we consider them. For the error pointed out, the judgment is Reversed.

Scott v. The United States.

Supreme Court of Iowa, 1843, 1 Morris 142.

Per Curiam, Mason, Chief Justice. - The plaintiffs in error were indicted in the court below for riot. On the trial, their counsel offered in evidence the transcript of a trial and judgment before a justice of the peace, wherein Scott was tried and fined for an assault and battery, and also offered to prove that such trial and fine was for the same offense for which he stands indicted for a riot. This testimony was rejected by the court. This is the first error assigned.

We think the evidence was properly rejected. No man shall be twice punished for the same offense, but here the second punishment sought to be inflicted is for a different offense. The greater includes the less, and the punishment for a riot would be a defense against a prosecution for an assault and battery, but not vice versa. If the rule sought to be established in this case be correct, then downright murder might often escape with the punishment for a mere assault and battery .....

Affirmed.

State v. Foster.

Supreme Court of Iowa, 1871. 33 Iowa 525.

To an indictment for assault with intent to inflict a great bodily injury, the defendant pleaded a former judgment of conviction before a justice of the peace, on a charge of assault and battery, with an allegation that both charges were founded upon the same act. A demurrer to this plea having been overruled, the state appealed.

Beck, Ch. J. - The demurrer could only have been overruled by the district court, upon the view that the offenses charged

are, in each case, identical, or the one for which defendant was convicted before the justice includes the one charged in the indictment. But neither proposition can be admitted. The demurrer therefore, ought to have been sustained.

Admitting that the offenses of assault and battery, and assault with intent to commit a great bodily injury are degrees of the same offense, it must be conceded that the first named is of a lower degree, and does not include the offense of the higher degree. To this proposition there can be no objection. While an assault, with an intent to commit a great bodily injury, may include an assault and battery, it is clear that the assault and battery cannot include the higher assault; the less cannot include the greater. A conviction or acquittal, in order to be a bar to another prosecution, must be for the same offense, or for an offense of a higher degree, and necessarily including the offense for which the accused stands indicted. It follows that a conviction or acquittal for a minor offense is no bar to a prosecution for a greater offense, except in the case of acquittal for manslaughter which would bar an indictment for murder, for the reason that if the defendant was innocent of the killing, without malice, he could not be guilty of the killing with malice. Scott v. U. S., Morris, 142; Hunt v. State, 25 Miss. 378; Burns v. People, 1 Parker, 182.

This is substantially the rule of section 4720 of the Revision, which is in the following language: "When the defendant has been convicted or acquitted, upon an indictment for an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment for the offense charged in the former or for any lower degree of that offense, or for any offense necessarily included therein." Now we have seen that defendant was convicted of an assault and battery. This conviction is no bar to the offense of assault with intent to do a great bodily injury, which is a higher offense, and not necessarily included in the less offense, assault and battery, of which defendant was convicted.

Reversed.

State v. Gleason.

Supreme Court of Iowa, 1881, 56 Iowa. 203, 9 N. W. 126.

Seevers, J. - The defendant pleaded a former conviction, as follows: "That as to the alleged stealing of the money and in this indictment charged against him, he was on - day of September, 1880, charged by information on oath in due form before John A. Jones, a justice of the peace for Polk county, Iowa, and being arrested

plead to said charge, and the said cause coming on for trial before said justice a judgment of conviction was rendered against this defendant by said justice, and he was ordered by said judgment to pay a fine of twenty dollars and costs, thirteen dollars of which fine and costs he then and there paid and was discharged. And the defendant says that the said charge was and is the same charge of stealing which is preferred against him in the indictment, and he is the same person who was prosecuted and fined as aforesaid before the said Jones.

And the defendant further says that the prosecution before the justice of the peace was not procured by him, was not in any wise fraudulent or collusive, and that he was arrested, charged and fined at the instance of prosecutors who were and are in nowise in his interest, and this he is ready to verify. The defendant brings now here into court attached hereto the said information which charged "that the defendant did feloniously steal, take and carry away of the property of Mrs. E.E. Updyke, money to the amount of eighty cents in silver, one pocket-book of the value of three dollars."

To the foregoing plea of former conviction the State demurred on the following grounds:

I. The indictment charges larceny from the person and defendant was charged and convicted of petit larceny.

2. The offense charged is not the offense for which defendant was convicted.

3. The justice had no jurisdiction of the offense charged in the indictment and could not convict him thereof.

The defendant was charged and convicted before the justice with the crime of petit larceny, which is a misdemeanor punishable by fine or imprisonment in the county jail. The indictment charges larceny from the person, which is a felony. The statute defining the crime is as follows: "If any person commit the crime of larceny by stealing from any building on fire, or by stealing any property removed in consequence of an alarm caused by fire, or by stealing from the person of another, he shall be punished by imprisonment in the penitentiary not exceeding fifteen years." Code § 3905.

In the State v. Foster, 33 Iowa, 525, it was held that a conviction before a justice of the peace on a charge of assault and battery was not a bar to an indictment for assault with intent to commit a great bodily injury, based on the same transaction. The correctness of this decision cannot, we think, be successfully denied, because the person charged was not tried before the justice for the intent with which the assault was committed. The intent originated with and was the act of the defendant. He alone was responsible therefor. The intent graded the crime, or rather because of it there were two crimes.

So in robbery. For there must be force and violence or putting in fear. Therefore it may be said a conviction for the larceny would not bar an indictment for the robbery because the person charged had not been punished for the whole thing - crime or crimes committed. This is true also as to a breaking with intent to commit larceny, when the offender has been acquitted or convicted of the larceny only.

Now in the case at bar it was not essential in order there should be a conviction under the indictment that an assault should be established. It is, however, difficult to see how there could be a larceny from the person without a technical assault. We apprehend, however, if a person should be sleeping on the ground, with a hat lying loosely over his face, the crime would be complete if another should steal and carry away the hat without disturbing the sleeper. Other cases of a like character might be suggested. The intent is and must be the same if the larceny be by stealing from the person or from a house or other place. The intent is the same in grand and petit larceny. The State v. Murray, 55 Iowa, 530. Stealing from the person is larceny and nothing more - it is so designated in the statute. For the larceny the defendant was tried and convicted by the justice of the peace.

Suppose a person rightfully enters a building or fire and feloniously steals and carries away property and is charged and convicted with the larceny, should he be again punished because the building was on fire, or if punished for stealing goods removed in consequence of a fire, should he be again punished for the same thing.

In Minnesota there is a statute making it a felony if larceny is committed by stealing from a shop. In the State v. Wiles, (Minn.) 4 N. W. Rep. 615, the defendant was indicted under the statute aforesaid for stealing a hat from a shop. The defendant pleaded a former conviction for the same larceny before a justice of the peace. It was held this was a bar and he could not be again prosecuted.

In this case the only intent on the part of the defendant was to commit larceny, and as he had been punished for all that he did or intended to do, it was held he could not be again punished for the same offense.

The statute creates the offense and declares the punishment. The defendant committed the offense and the State in the first instance failed to charge or allege a fact which would if established have increased the punishment. But such fact was not caused by anything done by the defendant. The extent of the punishment cannot, we think, grade the crime or create two offenses, so that the defendant can be twice punished for the same transaction.

Before this can be done the defendant must have done something with an intent for which he has not been punished, or because of the act done, it can be said two offenses were embraced therein.

Beyond doubt, we think, if the defendant had been acquitted when tried before the justice, this should be a bar to another prosecution for stealing from the person, because if he was not guilty of larceny he could not be of stealing from the person. The defendant, therefore, could not be convicted in this case unless the State established the larceny, and for this he has been punished. The demurrer, should have been overruled.

Reversed.

State v. Price.

Supreme Court of Iowa, 1905, 127 Iowa 301, 103 N. W. 195.

The defendant appealed from a judgment of conviction of the crime of incest.

Deemer, J. - On April 24, 1902, the grand jury of Ringgold county for the April term of the district court held therein returned two indictments against the defendant; one for the crime of rape, and the other for incest. In each defendant was charged with having had intercourse with one Gertie Blackmore, a step-daughter, who was under the age of fifteen years. The charge of rape was first tried to a jury, resulting in a verdict of not guilty. Thereupon defendant was placed upontrial for incest. To the indictment for that offense he pleaded not guilty, and also pleaded his former acquittal of the charge of rape as a bar to the charge of incest. and as an adjudication that he was not guilty of incest. A demurrer to this plea was interposed by the State, which was submitted and sustained. Defendant also offered in evidence on the trial of this case, which was for incest, the record of the proceedings in the rape case; objection to which was sustained by the trial court. After the evidence was all adduced, the jury in this case was instructed that defendant must be convicted, if at all, for an act of sexual intercourse which took place on or after November 12, 1901, thereby excluding from the consideration of the jury any act of intercourse which occurred prior to that date. Each indictment charged that the offense named therein was committed on the 1st day of the preceding October. On the trial for rape the State was permitted to prove all acts of intercourse covering the entire period included within the indictment; but at the conclusion of the evidence it was compelled to and did elect to rely upon an act of intercourse said to have been committed on or about October 28th. Upon the trial of this case the State was also permitted to prove various acts of sexual intercourse with the prosecutrix, but at the conclusion of its evidence on motion of the defendant it elected to rely upon an act occurring November 12, 1901.

In one of its rulings on the introduction of testimony the trial court said: "In this case the State has selected the 12th of November, another date. The court is of the opinion that, even if it should be held that the indictment for rape includes the crime of incest, that this is a prosecution for another and distinct act of sexual intercourse from what the prosecution was based upon in the other case. Taking in view of the fact the State elected before to depend upon the date of October 28th, ... and in view of the fact that the State now depends upon an entirely different date, the objection is sustained." In various other ways defendant raised the question of former acquittal, and the point now presented for decision is, was the plea of former acquittal sustained? As the prosecutrix was under the age of consent, it is conceded that the same testimony would have supported either charge, and that the indictments covered the same periods of time. The verdict of acquittal in the rape case was necessarily a finding that defendant had not had intercourse with the prosecutrix at any time during the period covered by the indictment. True, rape is not a continuing offense, but under a general charge, such as was made in this case, all acts of illegal commerce within the period of the statute of limitations might be shown; and in such cases a general verdict of acquittal is an acquittal of all. State v. Parish, 104 N. C. 679 (10 S. E. Rep. 457); Proper v. State, 85 Wis. 615 (55 N. W. Rep. 1035). But it said that, as the State elected in the rape case to rely upon one date, and in the incest case upon another, these rules do not apply, and there was no former acquittal, nor was the defendant in jeopardy in the rape trial for any other act of intercourse than the one relied upon by the State, to-wit, the one occurring on October 28th. This is a virtual concession that the doctrine of former acquittal applies, but that it only applies when the State relies upon the same and identical transactions. The concession is manifestly sound, but the qualification is not, unless all rules with reference to jeopardy are misapplied or misunderstood. A few suggestions will dispose of the fallacy involved in this contention. Suppose, after the jury had been impaneled and sworn in the rape case, and before the State had been compelled to make an election, the court had improperly directed a verdict for defendant, or had done any other act which would have entitled the defendant to a discharge, would it be contended that the defendant had not been in jeopardy as to every act or offense included within the statute of limitations? Could the state upon another trial, or upon the return of another indictment, covering the same period of time, successfully contend that, as it had made no election, there was no jeopardy as to any offense? Could it say that it intended, if called upon to make an election, to select one act, and that the second trial or the second indictment was for another? Manifestly, each of these propositions must be answered in the negative. What difference, then, does it make that upon the trial of the rape case the State did elect to rely upon a certain transaction or a certain date? None, as we think.

It must be remembered that in actions of this kind the State may prove as a part of its case every act of sexual intercourse

between the parties within the period of the statute of limitations; and every act so proved would undoubtedly, under the conceded facts in this case, have constituted both incest and rape. When compelled to elect, the State undoubtedly chose that act which it had the most evidence to sustain; and the verdict in the rape case was surely an acquittal of all acts which would constitute rape committed within the period covered by the indictment. That is to say, it was, in effect, a finding that the defendant had not had intercourse with the girl at any time within the period of time covered by the two indictments. State v. Stone, 75 Iowa, 215. But for a statute which prohibits the charging of two separate offenses in the same indictment, the crime of rape may be charged in one count of an indictment and the crime of incest in another. Porath v. State, 90 Wis. 527 (63 N. W. Rep. 1061, 48 Am. St. Rep. 954); Com. v. Parker, 146 Pa. 343 (23 Atl. Rep. 323); Com. v. Goodhue, 2 Metc. 193; Com. v. Squires, 97 Mass. 59. So also, may fornification and rape be joined. Jackson v. State, 91 Wis. 253 (64 N. W. Rep. 838). This being true, it follows, we think, that an acquittal in such a case is an acquittal of both offenses during the period covereed by the indictment. The mere fact that these offenses cannot now be joined in this State under our criminal procedure does not change the rule as to the effect of an acquittal. In State v. Thomas, 53 Iowa, 214, it was held by a divided court that rape and incest cannot be charged in the same indictment; or, more properly speaking, that the crimes charged in that particular case could not be joined. The soundness of the argument used in that opinion was challenged in State v. Hurd, 101 Iowa, 391, and in the latter case it is expressly held that incest was there included in the crime of rape, and that upon a trial for incest proof of rape upon the prosecutrix might be given. See pages 402, 403, of 101 Iowa. See also State v. Kouhns, 103 Iowa, 720.

In the absence of statute, it is the general, if not the universal rule that to sustain a plea of former acquittal it need not be shown that the offenses are the same. The test sustained by all the authorities is whether or not, if what is set out in the second indictment had been proved under the first, there could have been a conviction. When there could, the second cannot be maintained; when there could not, it may be. Or, putting it in another way, and in the manner in which it is usually stated the test is whether the first indictment was such that the accused might lawfully have been convicted under it, on proof of the same facts as those by which the second is to be sustained. State v. Stone, 75 Iowa, 215; U. S. v. Nickerson, 17 How. (U. S.) 204 (15 L. Ed. 219); Dill v. People, 19 Colo. 469 936 Pac. Rec. 229, 41 Am. St. Rep. 254); Wilson v. State, 24 Conn. 57; Roberts v. State, 14 Ga. 8 (58 Am. Dec. 528); Smith v. State, 85 Ind. 553; State v. Keogh, 13 La. Ann. 243; Com. v. Robey, 12 Pick. 496; Rocco v. State, 37 Miss. 357; State v. Jesse, 20 N. C. 98; Price v. State, 19 Ohio, 423; Parchman v. State, 2 Tex. App. 228 (28 Am. Rep. 435); State v. Waterman, 87 Iowa, 255. In State v. Hurd, supra, it is squarely held that the same testimony may support the charge of either

incest or rape; and, if the indictments cover the same period of time, it is clear that an acquittal of one is an acquittal of the other. In State v. Mickesell, 70 Iowa, 176, it is held that a former acquittal of the charge of larceny is a bar to a prosecution for robbery for the taking of the same money. Here the charges are not the same, but, as said in the opinion: "The acquittal on the former charge then is a judicial determination that he was not guilty of the larceny charged in that indictment, which is the same property that is described in the indictment on which he was convicted. That acquittal is a bar not only to an indictment for the larceny of the property, but for any other offense of which such larceny is an essential element." In Scott v. U. S., Morris (Iowa) 142, it was held that an acquittal for manslaughter is a bar to an indictment for murder, on the theory that the acquittal was a judicial determination that the defendant did not unlawfully take the life of the deceased, and, consequently, was not guilty of any offense of which such unlawful killing was a necesary element. In State v. Gleason, 56 Iowa, 203, it was held that a conviction for petit larceny before a justice is a bar to a subsequent prosecution on indictment for larceny from the person; the reason given being that, if defendant had been acquitted before the justice, this would have been a bar to another prosecution for stealing from the person, because if he was not guilty of larceny, he could not be of stealing from the person. In State v. Murray, 55 Iowa, 530, it is held that a conviction for petit larceny is a bar to a prosecution for grand larceny based upon the same facts. In State v. Copper, 13 N. J. 361 (25 Am. Dec. 490), it was held that one convicted of arson could not afterwards be tried for murder, in the commission of the same arson, where the statute imposed the penalties of murder for such arson. In State v. Lewis, 9 N. C. 98 (11 Am. Dec. 741), it was decided that, where two indictments for a felonious taking of goods were found against a prisoner, one charging him with burglary and larceny and the other with robbery, and under the first indictment he was convicted of larceny, he could not be tried upon the second indictment. See, also, Roberts v. State, supra.

These general rules are practically conceded by the State, but counsel contend that, as the State elected in the one case to rely upon an act of intercourse said to have been committed on October 28th and in the other upon an act committed on November 12th, they do not apply, and are not controlling. This proposition is unsound. When the jury was sworn in the rape case, defendant was in jeopardy as to every act of intercourse committed by him with the prosecutrix during the period covered by the indictment; and upon a verdict of not guilty being returned the State could not have reindicted and tried him for an act of intercourse committed at some time within the period covered by the indictment, for which the State did not elect to prosecute. This is fully established by the authorities already cited. If the acts of intercourse with the prosecutrix were entirely distinct and separate offenses, and could not have been proved under the original charge of rape, there would be much force in the position taken by the State. But in these sexual offenses it is competent for the State to prove any

and all acts of intercourse between the parties during the time covered by the indictment at least; and the defendant, for his own protection, and to enable him to make his defense intelligently, may require the State to elect upon which act it will rely. State v. Hurd, supra. But when election is required all the testimony as to other acts remains in the case, and as said in U. S. v. Harmison, Fed. Cas. No. 15,308 (3 Sawy. 556), the test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. That defendant was in jeopardy as to every act of sexual intercourse between him and the prosecutrix covered by the indictment for rape is very clear. The defendant may waive his right to move for an election on the part of the State, and if he does so, there is no doubt of the rule here announced. When he does move, and the election is made, he is nevertheless compelled to or may meet all the acts put in evidence by the State. In many cases the election is said to rest in the sound discretion of the trial court, and when made it is for the benefit of the defendant to enable him to properly meet the charge; and, as said in the Hurd Case, supra: "There is a manifest difference between cases in which the evidence as to other offenses is properly admitted (as in this case) as bearing upon the particular offense and where it is not admissible." In rape and other like cases an election may be required, but all the testimony as to other acts of sexual intercourse remains in the case, having probative force, and the effect is that the defendant is in jeopardy as to each. The State, in electing to prosecute for the one, in legal effect waives all the others, save that the others remain in evidence as a part of the State's case. State v. Smalley, 50 Vt. 738. This is undoubtedly the rule as to continuing offenses; and we think it also applies where the offenses are of the same nature or species, so that the evidence which proves the one would also prove the other. Holt v. State, 38 Ga. 187. In Commonwealth v. Arner, 149 Pa. 35 (24 Atl. Rep. 83), it is expressly held that one who has been convicted of fornication and bastardy cannot thereafter be tried for rape for the same act. See, also, Lynch v. Com. 18 Ky. 145 (35 S. W. Rep. 264), and Bryant v. State, (Ark.) 81 S. W. Rep. 234.

But, whatever the rule at common law and in other jurisdictions, the matter is settled for this State by statute. Code, section 5405, provides that a verdict of not guilty imports an acquittal on every material allegation in the indictment. In the rape charge time was not material, and the State could have shown, as it did, intercourse between the parties at any time within eighteen months prior to the finding of the indictment. The effect of the allegation in the indictment was that within eighteen months prior to the time of the finding thereof defendant had had intercourse with the prosecutrix. The verdict in the rape case acquitted him of that charge. Unless he did have intercourse with her, he was not guilty of incest. The two indictments cover the same period of time, and, while the offenses charged are not necessarily the same, they are of the same nature or species - that is to say are

both sexual offenses - and evidence which would prove the one would also prove the other. Identity of the transactions relied upon is not a proper test, for a single act or transaction may contain elements each of which are crimes under different statutes; and, as we have already seen, identity of charge is not the test. It is enough if an acquittal of one shows that the defendant could not have been guilty of the other. 1 Chitty's Criminal Law, 452-456. In State v. Waterman, 87 Iowa, 255, in construing the statute already referred to, we held that an acquittal upon an indictment for obstructing a highway was a bar to another indictment which covered a part of the time included within the first indictment. This was not because the offenses were each continuing in character, but because there were common elements in the two charges covering a part of the same period of time, to-wit, first, the existence of a highway, and second, its obstruction by the defendant. Applying the test heretofore given as to whether the evidence to support the second indictment would have justified a conviction under the first, we found that, as the time in the two indictments overlapped, the same evidence might have supported either charge, and that, as the highway was the same in each case, and the evidence as to the obstruction might have been the same for a part of the period covered by the two indictments, an acquittal on the former indictment was a bar to a prosecution under the latter. Further, it was said that under the provisions of the statute to which we have referred the acquittal under the first indictment was a finding that there was no highway which the defendant could obstruct; that this finding was conclusive, and could not be again inquired into in the same kind of a criminal action. That the crimes of incest and rape are of the same general nature - that is to say, are sexual crimes - has already been shown, and, if there were any doubt about this proposition, it is now settled by the Hurd Case, supra. In both rape and incest the criminal act is the unlawful carnal knowledge of a woman. As the offenses are of the same nature and species, the rule announced in State v. Waterman, supra, must govern, and unless we overrule that case we must reverse this.

Believing that that case was correctly decided, and that under well-known and familiar rules the doctrine of autrefois acquit applies, we must hold that the trial court was in error in its rulings with reference to the plea of former acquittal. The judgment must therefore be, and it is reversed.

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Part II

Proceedings Preliminary to Trial.

Chapter IV.

Steps by the State Prior to Indictment.

Section 1.

Introduction.

No man can be tried for crime during his absence, except that the Code authorizes a defendant to be "present" by counsel of the trial as for a misdemeanor (5338). His presence or representation at the trial is necessary even if, as is usually the case, this is obtained without his consent. But his presence is not essential to the finding of an indictment against him. The grand jury can decide whether he shall be tried for crime although he is still at large, but in actual practice it is not usually customary to wait for the indictment before making the arrest, lest the accused disappear in the meantime. Under certain circumstances this arrest may be made without a warrant. When such circumstances do not exist a warrant is necessary for the arrest, and even where they do exist a warrant is advisable if to obtain it will not increase the probability that the accused will escape.

From this it is apparent that the order in which these steps are taken is not always the same. Sometimes the defendant is indicted, after which there will be issued a bench warrant upon which he is arrested. At other times he will be arrested without a warrant and subsequently indicted. But we are apt to feel that the normal order for these events is that the warrant should precede the arrest and the indictment should come afterwards. It is in this order that they will be here considered. The discussion so far has had reference to order only and has not disclosed all the steps which will be taken. For example, if we assume that the arrest precedes the indictment, and is made under a warrant therefor, the full procedure will be as follows: First, a complaint will be filed; second, the magistrate will issue a warrant, for the arrest of the person accused; third, some peace officer will arrest the accused by virtue of this warrant; fourth, the arrested person will then be taken before the magistrate for preliminary examination; fifth, the result of the preliminary examination will be that the defendant is either discharged, admitted to bail, or committed to jail - if committed to jail the magistrate makes out a warrant of commitment which he delivers with the defendant to the officer; sixth, the county attorney then files an information against the defendant or draws an indictment to take before the grand jury which may either "find" or "ignore" it. If the grand jury "finds" the indictment against the defendant and he pleads not guilty thereto, he will subsequently be tried by a petit jury.

Misdemeanors "in which the punishment prescribed by law does not exceed a fine of one hundred dollars or imprisonment thirty

days" (5575) are nonindictable offenses and must be tried before a justice of the peace of the county in which the offense was committed. The procedure is quite similar to that already outlined up to the point of the preliminary examination. Instead of this preliminary examination the justice tries the defendant and the judgment of conviction or acquittal, entered as a result of this trial, ends the proceedings unless an appeal is taken.

Before considering the separate steps taken by the state we should mention the various modes of accusation. Our system of law permits no man to be placed on trial for crime unless he has been formally charged with the commission of a public offense. This is one of the fundamental conceptions of the common law. This formal accusation must set forth the particular offense with which the person is charged, and may take the form of (1) a complaint, (2) an indictment, (3) an information or (4) the finding of a coroner's jury.

At common law one formally accused of homicide by the finding of the coroner's jury could be arraigned and tried thereon, so that it had the force and effect of an indictment. But in this state an indictment or information must follow before the accused can be placed on trial (513 to 533) so that it has rather the character of a complaint than an indictment.

Section II.

The Complaint.

A complaint is a written accusation of a public offense, sworn to and filed by a private individual, before a magistrate.

State v. Stout.

Supreme Court of Iowa, 1887. 71 Iowa 343, 32 N. W. 372.

The defendant, having been convicted of adultery, appealed.

Seevers, J. - The indictment, among other things, states or charges that this prosecution is commenced on the complaint "of the wife of the defendant." It is provided by statute that "no prosecution for adultery can be commenced but on the complaint of the husband or wife," (Code, § 4008,) and the only question we are called on to determine is whether this prosecution is so commenced.

In Bush v. Workman, 64 Iowa, 205, it was said that the statute

is plain, easily understood, and that it forbids prosecutions for adultery except when the same are commenced on the complaint of the husband or wife.

In State v. Henke, 58 Iowa, 457, it was held that an averment in the indictment that the prosecution was commenced on the complaint of the wife was insufficient, and that the fact that the prosecution was so commenced was material, and must be established on the trial.

But in State v. Donovan, 61 Iowa, 278, it was held that such fact could be established by a preponderance of the evidence. In the same case the court instructed the jury that if the defendant's wife "appeared before the grand jury in response to a subpoena, and testified in the case, but not intending to prefer the charge of adultery against the defendant; but gave her testimony supposing she was required to do so, this would not be a complaint of her against her husband, within the meaning of the law." It was said that this instruction announces a correct rule.

In the present case, the court instructed the jury that, if the wife of the defendant went before the grand jury as a witness, even though she did so in obedience to a subpoena, and testified as a witness, this would be sufficient to sustain the averment in the indictment, in the absence of evidence to the contrary, that the prosecution was commenced on the complaint of the defendant's wife. It seems to us that this instruction conflicts with the instruction which was approved in State v. Donovan, above cited. Besides this, a complaint we understand to be a formal allegation or charge, preferred by some one against another, to an appropriate court or officer. Such a complaint, the statute requires, must be preferred by husband or wife. The indictment is not necessarily so preferred. Mrs. Stout no doubt testified to certain facts before the grand jury, and it will be conceded that she could not have been compelled to testify, but still she may not have believed her husband guilty, and did not intend to prefer a complaint against him. The mere fact that she testified as a witness is materially different from preferring a complaint. She in fact made no complaint, but simply responded to such questions as were asked her. We think the instruction above referred to is erroneous, and that there is no sufficient evidence showing that Mrs. Stout made a complaint as provided by statute.

Reversed.

Section 3.

The Warrant.

The warrant, which is issued by the magistrate upon complaint filed, is directed "to any peace officer of the state" (5183 and

5184), and may be served in any county in the state. (5186). The chief problem in connection with the warrant has to do with the circumstances under which it is required; and conversely, those under which no warrant is necessary for the arrest.

Yount v. Carney.

Supreme Court of Iowa, 1894. 91 Iowa 559, 60 N. W. 114.

The plaintiff, claiming to have been wrongfully arrested by the city marshal, brought suit on the official bond of that officer. When the evidence was in, the defendants filed a motion for a verdict, which was sustained and judgment was entered accordingly. The plaintiff appealed.

Given, J. .....

II. The single contention is whether the court erred in directing a verdict for the defendants. There is no question but that the defendant Carney, in his capacity as city marshal, did, on the evening of the fourteenth, and again on the evening of the fifteenth of December, 1890, in the city of Oskaloosa, without a warrant, and without the plaintiff having committed, or attempted to commit, any public offense in his presence, arrest and detain the plaintiff in custody for about two hours at each arrest. If these arrests were authorized and lawful, or if the plaintiff suffered no actual damage thereby, the action of the court is warranted; otherwise it is not. Section 4200 of the Code provides that "a peace officer without a warrant may make an arrest ..... (2) where a public offense has in fact been committed, and he has reasonable ground for believing that a person to be arrested has committed it."

Appellant contends that, under the evidence, the question whether defendant Carney had reasonable ground for believing that the plaintiff had committed a public offense should have been submitted to the jury; while appellees contend that the evidence shows without conflict that he had reasonable ground for so believing. In view of the conclusion we reach, it is not proper that we should discuss the evidence at length. We will only notice in a general way the authority under which the defendant Carney made these arrests. He states as his authority for making the first arrest "that Eli Hawkins had a telephone from Albia or Eddyville, that he had read to him, stating that a horse was stolen at Albia, and that two men had passed through Eddyville that afternoon with two horses and buggies or buckboards, and that one of the horses resembled the horse that was stolen." Mr. Hawkins testified that the parties sending the message requested him to watch the men, or get some one to hold them until they got there, and that he so told Deputy Marshal Bush, and that Bush went and got Carney. Plaintiff and one Jackson arrived in Oskaloosa on the evening of the fourteenth from Eddyville, plaintiff driving a horse to a cart, and Jackson driving

driving a mare to a buckboard. The first was made immediately after their arrival, and both Yount and Jackson detained in custody until the parties arrived from Eddyville, and declared that neither of the horses was the one that had been stolen. It is not stated by any of the witnesses that the request to Hawkins to detain the men was communicated to Carney, but such was probably the fact. Carney examined the mare before making the first arrest, and says: "I thought she was not the animal that was wanted. I did not think they were the thieves."

Other circumstances appear in the evidence proper to be considered in determining whether defendant Carney had reasonable grounds for believing that the plaintiff had committed a public offense, but we have stated sufficient to show that the question whether he had reasonable ground for so believing when he made the first arrest should have been submitted to the jury. The authority for making the second arrest was this: C. M. Forest, sheriff of Monroe county, who, it is claimed, held a warrant for the arrest of men for horse stealing, having heard of the arrest and release of the plaintiff and Jackson in the fourteenth, communicated with defendant Carney by telephone on the fifteenth. Forest states their communication as follows: "I called for the city marshal, and inquired for these parties, if he had them yet, and he said, 'No.' * I asked him what he knew about their declarations, - whether he thought them to be true or not, I think I said to him I thought he could search them and satisfy himself. He wanted to know if we could not give him some better description of them than we had. He said he had turned his parties loose, and that they had gone into the country, but he was looking for them back. He said, if they came back, he would satisfy himself. He did so and reported to me." Carney states it as follows: "Monday evening, the sheriff at Albia called me up at the telephone, and asked me why I didn't arrest those fellows and search them. I told him I didinot think they were the men that were wanted. I said these men have been here since Sunday, and, if they were horse thieves, I don't think they would remain quite so long. He said, 'You go on and arrest them and search them.'" He further states that, when he arrested the men the last time, he was entirely satisfied in his own mind that they were not the men who had stolen the horse. It will be observed that Carney testifies that Forest said, "You go on and arrest them and search them," while Forest does not state that he gave such an order; thus presenting a material conflict in the evidence. The question whether defendant Carney had reasonable ground for believing that the plaintiff had committed a public offense when he made the second arrest should have been submitted to the jury.

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Reversed.

* I asked him if he knew him, and he said he did not, but that they claimed that they were fruit-tree agents.

State v. Phillips.

Supreme Court of Iowa, 1902. 118 Iowa 660, 92 N. W. 876.

From a conviction of murder, with death penalty, the defendants appealed.

Weaver, J. - Albert City is an incorporated town situated in the eastern part of Buena Vista county, Iowa. Between two and three o'clock in the afternoon of the 16th day of November, 1901, one Gillium, a druggist doing business in said town, received a message by telephone from some person whose identity is not disclosed in the record, but supposed to have been speaking from the town of Sioux Rapids, to the effect that on the night previous a bank at the town of Greenville, in Clay county, had been burglarized, and that three persons suspected to have been connected with that offense had been seen moving in the direction of Albert City. Gillium soon met one Lodine, a drayman, who was also marshal of the town, gave him the substance of the message he clained to have received, and told him to look out for and arrest the three men, describing them as two white men and a mulatto, or two white men and a negro; the exact phrase employed being in some doubt. Later in the afternoon, Lodine reported to Gillium the presence of three men, whom he believed to be the persons wanted, in the waiting room of the railroad station a block or two distant. Gillium, thereupon made an errand to the station, saw the men, and, coming back to his store, told Lodine he believed them to be the parties whose arrest was desired. A party was then organized to effect the capture, consisting of Lodine, Gillium, John Sundblad, M.H. Conlin, A. Gulbranson, Dr. Knee, Mr. Shob, and others. Lodine was armed with a repeating rifle, Sundblad with a repeating shotgun, and Gillium and Gulbranson with revolvers. Whether others carried weapons, and, if so, the character of them is not clear. Proceeding to the station, the marshal and his party crowded through the door of the waiting room in a body as nearly as possible, with weapons in hand ready for instant use. As they entered they advanced in the direction of the suspected men, - being the appellants, and one Dolan, who was killed later in the fray, - the marshall calling out, "Hands up! Hands up!" Some of the witnesses also say he added to this command the words, "We want you." Defendants and Dolan immediately drew revolvers, and numerous shots were exchanged, though the testimony tends to show that one of the defendants or Dolan was first to discharge his weapon. The marshal and his party soon retreated, taking up various positions where they could command the door and windows of the waiting room, Sundblad running across the railroad track and taking his stand behind a freight car. From these positions shots were fired into the waiting room, and at intervals defendants and Dolan came to the door and fired at the posse. One of the shots so fired it is alleged inflicted upon Sundblad a wound of which he died a day or two later. Finally the besieged party emerged from the station, and sought to escape into the country. In this movement Dolan received a fatal shot from one one the posse. The defendants continued the retreat, closely followed

by their pursuers, and after a running fight of several miles were captured. The indictment in this case was returned November 22, 1901, and the trial was had five days later.

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XI. The legality of the arrest or attempted arrest by the marshal and his posse is elaborately argued by counsel, and was the subject of several paragraphs of the court's charge to the jury. The theory of the appellants is, first, that the marshal, having no warrant, was without any authority to make the arrest; and, second, that even if the authority existed it was exercised in an unlawful manner, and thereby provoked the fight in which Sundblad was killed. A public officer may make an arrest without warrant whenever a public offense has been committed, and he has reasonable ground for believing that the person to be arrested has committed it. Code, section 5196. A private citizen may exercise like authority when a felony has been committed. Code, section 5197. The question whether a felony had been committed and whether Iodine had reasonable ground to believe the defendants to be the guilty parties was for the jury. We think it was sufficiently clear that a felony had been committed by some one. The defendants' complicity in that crime is not open to bout. The marshal, upon a somewhat uncertain and fugitive rumor of such offense, had his suspicion directed to the men in the waiting room of the station, and undertook their arrest. Had it proved that no crime was in fact committed, or that the defendants were wholly innocent thereof, it would doubtless have been very difficult for him to defend an action for damages for wrongful arrest. But so long as the rumored offense was in fact committed, and the parties arrested were in fact guilty thereof, the truth, when ascertained, should be held sufficient justification of the act of the officer. In other words, if an officer makes an arrest upon insufficient information he acts at his peril, and assumes the risk of being held in damages to an innocent person thus injured; but if a felony has been committed, and the officers seize the guilty party without undue violence, he does no wrong. In each case the information upon which he acted is immaterial. It would be an anomalous proposition to hold an officer chargeable with wrong in arresting the right man; assuming, of course, that the arrest be made in a proper and lawful manner.

The manner in which the marshal and his assistants undertook to seize the defendants and Dolan presents a less clear question. The statute provides (Code, section 5199) that a person making an arrest must inform the person to be arrested of the intention to arrest him and of the cause thereof, and require him to submit to custody. No particular form of words is prescribed, but the information is to be given to the person accused, and opportunity given him to submit in an orderly and peaceable manner, unless good reasons appear for the omission of such duty. It is doubtless true

that under some circumstances, as where the accused person is fleeing from the officer, or is making active resistance, these formalities need not be strictly observed. That the marshal's party acted in the highest good faith as citizens, desiring to vindicate the law, cannot be questioned; and if the defendants knew, or as reasonable men should have known, that nothing but their arrest was sought, and no bodily harm was intended, then they could not justify the use of deadly weapons in resistance, even though the arrest was unlawful. On the other hand, if the posse, even though acting in good faith and with no intention of violating the law, suddenly advanced upon the accused with loaded guns, presented in a threatening manner, thereby impressing the latter, as reasonable men, with the belief that they were about to suffer great bodily harm, or be placed at the mercy of an angry mob, then they had the right to resist, and employ such force as was reasonably adequate to defend themselves against the attack, without regard to their guilt of the charge upon which their arrest was sought. The language, "Hands up! Hands up!" or "Hands up! We want you!" emphasized with rifles, shotguns, and revolvers, may, of course, be used with the idea that the party thus addressed is required to subject to arrest, but it must be admitted that to the average mind it ordinarily conveys a much more uncomfortable suggestion.

The defendants, even though charged with burglary, were entitled to the protection of the law and a trial in due course of criminal procedure, and if exposed, or if as reasonable men, in view of the display of force against them, they believed themselves exposed, to personal violence, neither the fact of their guilt, if guilty, nor of the honesty of purpose of the marshal and his party, would deprive them of their right to resist. Such rightful resistance is, of course, proportioned to the danger to be avoided, and if in the heat of combat thus occasioned it is carried beyond that limit, and death is thereby caused, the crime will be murder in the second degree or manslaughter, according as malice may or may not be found to characterize the wrongful act. Even a legal arrest, whether with or without warrant, may be attempted in such a violent and menacing manner that, if death result to the officer in the heat of a struggle thus excited, the killing will not be murder in the first degree. As bearing upon the several points here suggested, see Rex. v Ricketts, 3 Camp. 68; Tiner v. State, 44 Tex. 128; Bellows v. Shannon, 2 Hill, 86; Rafferty v. People, (Ill.) 18 Am. Rep. 601; Jones v. State, (Tex. App.) 8 S. W. Rep. 801, 8 Am. St. Rep. 454; Wright v. Com., 85 Ky. 123 (2 S. W. Rep. 904); Starr v. U. S., 153 U. S. 614 (14 Sup. Ct. Rep. 919, 38 L. Ed. 841); Groom v. State, 85 Gs. 718 (11 S. E. Rep. 1035, 21 Am. St. Rep. 179); State v. Mahon, 3 Har. 568; Wharton, Criminal Law; Golden v. State, 1 S. C. 292; Minniard v. Com., 87 Ky. 213 (8 S. W. Rep. 269); Drennan v. People, 10 Mich. 169.

The trial court instructed the jury quite clearly upon the general principle here discussed, but in making reference to the ca

on trial said to the jury that if the officer, upon reasonable information and belief of the defendant's guilt, "summoned a posse of citizens, and with them, armed with guns and revolvers, went to the depot where the defendants were at the time, and with and in the presence of the posse called upon the defendants to throw up their hands, and informed them that he wanted them, "then the resistance was unlawful, and if, in making such defense, Sundblad was killed, then defendants were guilty as charged." To make such rule applicable the jury should have been charged they must also find that defendants knew, or as reasonable men ought to have known, that their arrest was sought by lawful authority, and that their personal safety was not being imperiled at the hands of the arresting force. The defendants were, so far as appears, entire strangers in the neighborhood; there is no evidence that they knew the official character of Lodine; the demand made upon them did not necessarily mean a summons to submit to lawful arrest; the demonstration of force against them was such as would amount to an assault if made without proper authority; and it should have been left to the jury to say whether defendants were sufficiently apprised of the lawful purposes of the marshal and his party.

Other questions are raised by counsel, but, in view of the conclusions already announced, it is unnecessary to consider them. The judgment of the district court is reversed, and the cause remanded for a new trial. - Reversed.

(Deemer, J., dissented)

State v. Towne.

Supreme Court of Iowa, 1917. 180 Iowa 339.

From a conviction of manslaughter the defendant appealed.

Deemer, J. - I. The facts are not seriously in dispute, and the argument is largely directed to the sufficiency thereof to sustain the verdict.

Defendant was a business man, engaged in handling general merchandise in the town of Jamaica. He lived on the same street on which his store was located, and about five blocks due north thereof, his house being the last one on that side of the street. North of his house was a public highway, and north of this highway was a cornfield. At the intersection of the first street south of his house with the street on which the house is situated, there was a small wooden bridge, and just south of that, a small hill rising some 30 or 40 feet to the sidewalk on the west side of the street. Defendant's brother lived about midway between his (defendant's)

house and his store, and on the same side of the street. At about 8:30 o'clock in the evening of March 13, 1915, three of defendant's children, a daughter, Gretchen, 19 years of age, and two boys, one about 15 and the other 12 years of age, left defendant's store and started for their home up the street which we have just described. They were followed by a stranger, who is described as a tall man, wearing a cap with the visor down and pulled over the eyes. This stranger followed the children as far north as defendant's brother's house, where he followed defendant's daughter into the yard. Defendant followed his children from the store almost immediately, and overtook them at the brother's house. He found his daughter and his sons standing near the house, and the stranger standing 10 or 12 feet north of them. About the time the defendant arrived at the house, the stranger remarked to one of the boys: "Are you just coming home from school?" As the defendant passed on the sidewalk going north, the daughter went past the stranger to meet her father, and as she did so, this stranger leaned forward with his cap pulled down, took a step or two in advance, and made some remark to the young lady, which none of the bystanders heard or understood. The girl was frightened, and, with her youngest brother, ran past her father and on to her own home. Defendant and his oldest boy walked on together toward their home, and the stranger followed them until they reached their own house. As they approached their house, defendant instructed his son, who was with him, to run into the house and get his gun - a shotgun. The boy obeyed, brought the gun out and loaded it, and handed it to his father, near the South door of the house at the west end thereof. It should be remarked that the streets were not lighted in any manner, and that the night was dark. When defendant received the gun from his son, the stranger being in the yard of defendant's house and something like 15 feet away, and approaching him, he (defendant) ordered the stranger not to come any closer, and asked him what he was doing there. The stranger replied that "he had just gotten off the train and was walking around." He (defendant) asked him his name, and he responded by asking: "Who lives here? He (defendant) then asked him what his business was, and, instead of answering, he asked another question and continued to walk toward the defendant. Defendant then told him not to come any closer or he would shoot, and at the same time, it is claimed, told him he would take him up town and turn him over to the marshal. Acting upon this suggestion, he ordered the stranger to go ahead of him down town. The stranger started toward town, with defendant and his eldest son following him, the defendant with gun in hand. The stranger halted at times, but defendant pressed him on. When they got to the bridge south of defendant's house, the stranger stopped, and said to defendant that he did not intend to hurt them. Defendant again told the stranger to move on down town, and the stranger proceeded on across the bridge and on to the top of the little hill which we have described, and there stopped. Defendant, with his son, was then at the bottom of the hill. As he reached the top of the hill, the stranger stopped, screamed in a loud tone, "You fellows," and rushed back with arms extended to where defendant and his son were standing, and came within 5 or 10 feet of defendant, who had then leveled his gun upon the stranger, and, as he approached, defendant says he made a motion as if to

grab the gun, when he (defendant) fired both barrels at the stranger, resulting in wounds from which the stranger died the next afternoon. This stranger was soon found to be a man named William Berry, an eccentric, if not insane person, who had a brother living at Jamaica until a few days prior to the shooting. Berry had lived at Perry until a few months prior to his death, and, after leaving Perry, lived at Waukee, where he was working for his board. He was discharged by the people for whom he had been working, because of his peculiarities and eccentricities, and taken by them to the depot in Waukee on the day he was killed. Before he died, he told defendant that he (defendant) was in no way to blame; that he forgave him; and that, if he had not followed defendant's daughter, he would not have been hurt.

The court submitted the case to the jury to determine whether or not defendant was acting in self-defense, and instructed that the defendant was not justified in using a deadly weapon simply to effectuate an arrest of the stranger for violation of some town ordinance or for a misdemeanor. Whilst these instructions are complained of, they seem to announce correct rules of law, and, on the whole record, the case was properly submitted to the jury for it to determine whether or not defendant's act was in lawful defense of his person.

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The following instructions are challenged:

"If you find from the evidence in this case that said William Berry was at the time in any manner disturbing the peace and quiet of the defendant, or his family, within the town of Jamaica, then he was guilty of a violation of the provisions of said ordinance, and, if said offense was committed or being committed in the presence of the defendant, then the defendant had the right under the law to arrest or cause the arrest of the said William Berry, and to turn him over to a peace officer of said town of Jamaica. You are instructed, however, that in making such arrest, if he did make such arrest, or attempt to make such arrest, it was the duty of the defendant to in some manner give said William Berry to understand that he was so placed under arrest, and that said William Berry should submit to such arrest, and that it was the intention of the defendant to turn said William Berry over to a peace officer of the town of Jamaica. In making such arrest, the defendant had no right to use any other means or any greater force than was reasonably necessary to accomplish that purpose, and, in his efforts to make such arrest or to turn said William Berry over to a peace officer of the town of Jamaica, in accomplishing that end alone, he had no right to make use of a deadly weapon in a deadly manner to accomplish such purpose; and so the defendant cannot justify the taking of the life of said William Berry merely on the grounds that he, as a private citizen, had the right to arrest said William Berry,

and was in the act of taking said William Berry to a peace officer of the town of Jamaica for the purpose of turning him over to such peace officer, and this feature of the case is submitted to you only for the purpose of your determination of the fact as to whether, under all of the circumstances disclosed by the proof, the defendant was at the time justified in being armed with a deadly weapon, and in using same in a deadly manner. And so, in the determination of this case, you will bear in mind that, so far as the mere making of an arrest by the defendant as a private citizen, of said William Berry, and in attempting to deliver him to a peace officer of the town of Jamaica, Iowa, however said William Berry may have resisted such an arrest, if it went no further than mere resistance to such arrest or attempt to flee from said defendant to avoid an arrest, the defendant would not be justified in using a deadly weapon in a deadly manner; nor would he be justified in so using such deadly weapon in a deadly manner unless in doing so he was acting in necessary self-defense, as his right in relation thereto is more fully explained to you in subsequent instructions."

These announce correct, well-established rules of law, and no authorities need be cited in their support.

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Affirmed.

(Evans, J., dissented).

State v. Small.

Supreme Court of Iowa, 1918.- Iowa, - 168 N. W. 116.

Ladd, J. The defendant is charged with having resisted arrest by a policeman without a warrant. His offense is said to be "using of loud, boisterous, obscene and abusive language in a public place and disturbing the peace and quiet of the community and acting in a riotous, indecent and unlawful manner."

The policeman testified, in substance, that defendant entered one Snyder's pool hall and asked for pop, saying that "this was to put into some more alcohol" and, applying an epithet to the officer, added that he could not take that away from him; that the witness responded that no one had said anything about doing so; that Snyder then asked defendant to leave and he refused, whereupon the witness advised him to go home as he did not care about arresting him, and defendant answered that he would not do it, that there were not enough policemen in town to arrest him, upon which the witness told him he was under arrest and took hold of him; that a scuffle ensued in which defendant struck the witness and got him by the neck

and both fell; that defendant then said if he were allowed to get up he would go with him like a man, but upon arising struck at the witness and went out the door, threatening the witness if he followed him and went to his home. "Q. What caused you to arrest him? A. He began to abuse me and did not pay any attention to the houseman, Mr. Snyder. Did not leave when told, and Snyder said, 'You will have to do something with him.'"

The defendant admitted entering the pool hall to purchase a couple of bottles of pop, and testified, that, when he called for it, the officer suggested that he must be going to change the color of his drink; that defendant replied that it was none of his (the officer's) business; that one word brought on another, and finally the officer attempted to hit him with his club and told him to go home, and he did go home, and the officer came down to his house; that the officer said nothing about arresting him; that he had not been drinking, had no alcohol there; that he was in the hall not to exceed two minutes, and went straight home and said nothing after he left the hall.

(1) From this evidence the jury might have found the controversy to have been solely between the officer and defendant, that the defendant was innocent of wrongdoing, and that no public offense was committed in the presence of the officer. An officer may make an arrest without a warrant: "(1) For a public offense committed or attempted in his presence, (2) where a public offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it." Section 5196, Code. An offense, then, must have been committed in the presence of the policeman in order to have justified him in making the arrest. It is not enough that he may have so thought or have had reasonable ground so to believe; the offense must actually have been attempted or committed in his presence to have justified the arrest. Snyder v. Thompson, 134 Iowa, 725, 112 N. W. 239; Stearns v. Titus, 193 N.Y. 272, 85 N. E. 1087. See note to Price v. Tehan, 34 L. R. A. (N.S.) 1182, in which the cases are collected.

(2) In such a case, unless the conditions recited in the statute exist, the arrest is unlawful and the party arrested may resist with such force as appears to him, acting as ordinarily prudent man, to be reasonably necessary. The law jealously guards the liberty of the citizen, and a public officer has no right, because of being clothed with the habiliments of office, to interfere therewith save as provided. Notwithstanding this, the court instructed the jury, in substance, that if Blair was an officer as alleged, and defendant knew this, and the officer informed him that he was under arrest and required him to accompany him, and the defendant refused so to do and made willful resistance to the officer's taking him to the police station, he should be found guilty. This entirely overlooked the inquiry as to whether the defendant was engaged in the commission of any offense at the time of the arrest, and in this respect was erroneous. In the instructions following the jury was

told that defendant owed the duty to submit to the officer, if he knew of his official character when informed that he was arrested. He owed no such duty unless at the time he was engaged in the commission of a public offense.

Judgment is reversed, and cause remanded.

Section 4.

The Arrest.

"Arrest is the taking of a person into custody when and in the manner authorized by law, and may be made at any time of any day or night." (5193)

Hobbs v. Illinois Central R. Co.

Supreme Court of Iowa, 1917. 182 Iowa 316.

Per Curiam. .....

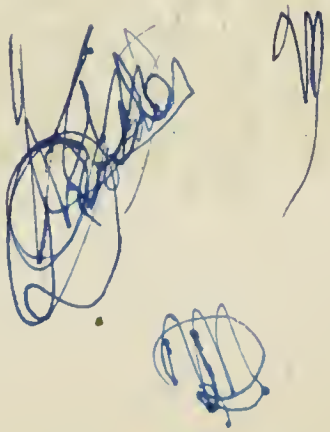
It is strenuously argued that there was no evidence of any arrest save the one after the information was filed, and that this was made under a proper warrant, and by the chief of police. An arrest is defined by our Code as:

"An arrest is made by an actual restraint of the person to be arrested, or by his submission to the custody of the person making the arrest. No unnecessary force or violence shall be used in making the same, and the person arrested shall not be subjected to any greater restraint than is necessary for his detention." Code Section 5194.

There need not be an application of actual force, or such physical restraint as is visible to the naked eye. McAleer v. Good, (Pa.) 10. L. R. A. (N. S.) 303.

State v Freeman 8 Ida 425

Stockton, J. - First. As to the demurrer to the indictment, it was not necessary, in charging the defendant with knowingly and wilfully resisting an officer, authorized by law, in attempting to execute a legal writ, to aver that the officer, at the time, informed the defendant that he acted under the authority of a warrant. In making an arrest, the officer must inform the defendant, that he acts under the authority of a warrant, and if required, must produce and show it. Code, section 2839. But it is not necessary that the indictment, should set forth, at length, the acts of the office-



or show that in making the arrest, he complied, in all respects, with the requisites of the statute. In serving the writ, he will be presumed to have discharged his duty; and if the defendant relies on the fact that he omitted to declare the authority under which he acted, it was proper matter of defense.

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State v. Smith.

Supreme Court of Iowa, 1905. 127 Iowa 534, 103 N. W. 944.

From a conviction of manslaughter under an indictment for murder, the defendant appealed.

Deemer, J. - Defendant shot and killed one William G. Sarver. At the time of the homicide the defendant was a policeman in the city of Albia, and had arrested without a warrant S. D. Sarver, father of William G., for the crime of drunkenness. William G. interfered in the matter, and as a result of the altercation received a pistol shot, from the effects of which he almost immediately died. Defendant contended that the killing was justifiable on two grounds: First, because in defense of his person; and, second, because it was necessary to prevent a felony, and to secure an arrest of the deceased, or to prevent his escape.

The trial court gave the following among other instructions:

(23) When a peace officer, in making an arrest for a misdemeanor, is resisted by violence and force in making such arrest, then such officer has the right to resist force by force; and when the resistance is violent and determined such officer is not bound to make nice calculations as to the degree of force necessary to accomplish the purpose, but may use such a reasonable degree of physical force in overcoming such resistance and effecting such arrest as may reasonably appear necessary therefor, and to prevent the escape of the party whom he is arresting; but he has no right to take the life of such person, or inflict on him a great bodily harm, for the purpose of making such arrest, except when the officer has a reasonable apprehension of peril to his own life or of suffering great bodily harm.

(24) If you find that the defendant had arrested S. D. Sarver, and W. G. Sarver, with knowledge thereof, appeared, and undertook by violence upon the defendant to effect the release of S. D. Sarver from such arrest, then it was the defendant's duty to arrest him, and his duty to submit thereto; and if the said W. G. Sarver by violence upon or against the defendant resisted such arrest, and attempted to escape therefrom, then the defendant had the right to resist by force, and was not bound to make nice calculations as to the degree of force necessary to accomplish the arrest, but he had the right

to use such a reasonable degree of physical force in overcoming such resistance and effecting such arrest and preventing an escape as appeared reasonably necessary therefor; but he had no right to take the life of said Sarver, or inflict upon him a great bodily injury, simply to effect the arrest, unless he had reasonable apprehension to peril to his own life, or of suffering great bodily harm.

The defendant asked the following, which were refused, to-wit:

(1) If you find that S. D. Sarver and Wid Sarver were in a condition of intoxication, and were therefor placed under arrest by the defendant, then you are instructed that it was their duty to submit to such arrest, and they had no right, by violence or otherwise, to resist such arrest; and if they attempted to escape from the arrest it was defendant's duty to resist and prevent the escape. And if you find that they did, by violence upon the defendant or otherwise, endeavor to escape from such arrest, then it was the duty of the defendant to do his utmost to prevent such escape, and in preventing it he had the right to use all the force and violence that, under all the circumstances and conditions then surrounding him at the time, seemed to him in good faith, as an ordinarily reasonable man, necessary to prevent such attempted escape, even to the use of a deadly weapon, if it so seemed to him necessary to use it.

(3) If you find that the defendant had arrested S. D. Sarver, and that Wid Sarver, the deceased, appeared, and undertook by violence upon the defendant to effect the release of S. D. Sarver from such arrest, then it was defendant's duty to also arrest the said Wid Sarver, and it was said Sarver's duty to submit to such arrest; and if the said Wid Sarver, by violence upon or against the defendant, resisted such arrest, and attempted to escape therefrom, the defendant had the right to use all the force and violence that to him, in good faith as an ordinarily reasonable man under all the surrounding circumstances and conditions seemed to him necessary to prevent the escape.

Of the instructions given and of the refusal to give those asked defendant complains. Taking up the ones given in the order quoted, we are of opinion that the first was correct. While the authorities are not in harmony upon the proposition involved, the better rule seems to be that an officer is not justified in killing a mere misdemeanant in order to effectuate his arrest, or to prevent his escape after arrest. In such cases it is better, and more in consonance with modern notions regarding the sanctity of human life, that the offender escape than that his life be taken, in a case where the extreme penalty would be a trifling fine or a few days' imprisonment in jail. Reneau v. State, 2 Lea, 720 (31 Am. Rep. 626); Skidmore v. State, 2 Tex. App. 20; U. S. v. Clark (C.C.) 31 Fed., 710; Head v. Martin, 85 Ky. 480 (3 S. W. 622); Smith v. State, 59 Ark. 132 (26 S. W. 712, s.c.43 Am. St. Rep. 20); State v. Moore,

39 Conn. 244; Dilger v. Com., 88 Ky. 550 (11 S. W. 651). To this rule there are some exceptions, as in cases of riot, mob violence, etc. None of the exceptions apply to this case, however. The general rule does not, according to the great weight of authority, apply to felonies. Here an officer may oppose force to force, and, if there be no other reasonable apparent method for effecting the arrest or preventing the escape of the felon, the officer may, if he has performed his duties in other respects, take the life of the offender. This rule not only applies to the felon himself, but also to those who are seeking to rescue the prisoner. State v. Dierberger, 96 Mo. 666 (10 S. W. 168, 9 Am. St. Rep. 380); State v. Garrett, 60 N. C. 144 (84 Am. Dec. 359); Clements v. State, 50 Ala. 117; Lynn v. People, 170 Ill. 527 (48 N. E. 964); Jackson v. State, 76 Ga. 473; State v. Bland, 97 N. C. 438 (2 S. E. 460). Even in such cases the officer is not the arbitrary judge as to whether the necessity exists for taking life. That question is ultimately for the jury under proper instructions. State v. Bland, supra. But it is erroneous in such cases for a court to instruct as a matter of law that an officer is not justified in taking the life of a felon. 1 East, P. C. 298. The authorities on this subject are collated in an excellent note found in Hawkins v. Commonwealth, 61 Am. Dec., pages 151-164. The reasons for these rules are apparent. An officer, in the performance of his duty as such, stands on an entirely different footing from an individual. He is a minister of justice, and entitled to the peculiar protection of the law. Without submission to his authority there is no security, and anarchy reigns supreme. He must, of necessity, be the aggressor, and the law affords him special protection. In his capacity as an individual he may take advantage of the "first law of nature," and defend himself against assault; as an officer he has an affirmative duty to perform, and in the performance thereof he should so long as he keeps within due bounds, be protected. Sentimentalism should not go so far as to obstruct the due administration of law, and brute force should not be permitted to obstruct the wheels of justice.

Now, in the present case there was evidence tending to show that after the defendant had placed S. D. Sarver under arrest for drunkenness, and was endeavoring to take him to jail, he (Sarver) was attempting to escape from such arrest, and that W. G. Sarver made an assault upon the officer for the purpose of aiding his father to escape; that the defendant then attempted to arrest W. G. Sarver, who resisted the same, and continued his assault upon the policeman; and that finally defendant shot W. G. Sarver, inflicting wounds from which he (Sarver) died. To meet this feature of the case the trial court gave the twenty-fourth instruction, which, in effect, announces the rule that under no circumstances was the officer justified in taking the life of W. G. Sarver. In this, we think, there was manifest error. There was evidence tending to show that both before and after the arrest of W. G. Sarver he (Sarver) was resisting and assaulting the officer, not only to effectuate his own escape, but also to secure the release of his father, S. D. Sarver. Section 4896 of the Code provides that: "Every person who aids or assists any prisoner in escaping or attempting to escape, from the custody of any sheriff, deputy sheriff, marshal, constable, or other officer, or person who has the

lawful charge, with or without a warrant, of such prisoner, upon any criminal charge, shall be fined not exceeding one thousand dollars, and imprisoned in the penitentiary not exceeding five years." The penalty provided for the prohibited acts makes the crime a felony, and the law as to the duties, obligations, powers, and rights of an officer in making arrests and preventing escapes of those engaged in the commission of a felony clearly applies. State v. Turlington, 102 Mo. 642 (15 S. W. 141).

The third instruction asked by the defendant, or something like it, should have been given. The killing must, of course, be apparently necessary, for one is not justified in taking human life if there be any other effective way of effecting the arrest; but this is a question of fact for a jury, and not of law for the court. The Attorney-General contends that there is no evidence in the case which called for an instruction on this subject. The trial court thought differently, and submitted the matter to a jury under an erroneous instruction. Such being the record, prejudice will be presumed, and the case must be reversed, unless it affirmatively appears that the error was without prejudice. The defendant's testimony - which we shall not set out at this time - was such as to call for a proper instruction on the subject, for it tended to show that W. G. Sarver was engaged in the commission of a felony, to-wit, of attempting to secure the escape of a prisoner in the custody of a policeman, when the fatal shots were fired. If the jury believed the defendant's statements, it might have found that W. G. Sarver made an assault upon the defendant, a policeman, after he had lawfully arrested S. D. Sarver, for the purpose of securing the escape of S. D. Sarver. In so doing he was engaged in the commission of a felony, and defendant, as an officer, had the undoubted right to use a weapon to prevent this felony; if that were the only reasonably apparent method of accomplishing the result. State v. Moore, 31 Conn. 479 (83 Am. Dec. 159); Pond v. People, 8 Mich. 150; Ruloff v. People, 45 N. Y. 215; People v. Angels, 61 Cal. 188. A killing under such circumstances, however, must be for the honest and non-negligent purpose of preventing the felony, and not for some other reason. People v. Burt, 51 Mich. 199 (16 N. W. 378).

The trial court was in error in giving its twenty-fourth instruction, and the judgment must therefore be reversed.

Commercial Exchange Bank v. McLeod.

Supreme Court of Iowa, 1885. 65 Iowa 665, 19 N. W. 329.

In an action on a promissory note, the defendant filed a motion to discharge certain property from an attachment which was levied thereon at the suit of the plaintiff. This motion having been sustained the plaintiff appealed.

Rothrock, Ch. J.- On the thirty-first day of January, 1883, the plaintiff commenced an action against the defendant and others upon a promissory note. It was alleged in the petition that defendants had disposed of their property in part with intent to defraud their creditors, and a writ of attachment was prayed for and issued, which was placed in the hands of the sheriff for service. The plaintiff is a partnership, and H. P. Kirk and I. R. Kirk are the individual members thereof. On the twenty-eighth day of August, 1883, said I. R. Kirk made and filed an information before a justice of the peace, charging the defendant with the crime of uttering a forged promissory note. A warrant was issued, and the plaintiff was arrested by a constable and taken to the county jail. Upon his commitment to the jail, the sheriff, who was the keeper thereof, proceeded to search the defendant's person, and took therefrom one gold watch, one silver watch, and $480 in money, and, having the attachment and money and property all in his hands, he made return that he had levied the attachment on the watches and money.

Section 4212 of the Code provides: "He who makes an arrest may take from the person all offensive weapons which he may have about his person, and must deliver them to the magistrate before whom he is taken, to be disposed of according to law." We do not think that an officer making an arrest is precluded by this statute from taking from the person of the prisoner any other property than "offensive weapons". An officer making an arrest, or a jailor upon committing a person to jail, may search him and take from him all property which might be used by the prisoner in affecting an escape. In Reifsnyder v. Lee; 44 Iowa, 101, the defendant stole five head of cattle, and sold them to the plaintiff for $162.30. The owner of the cattle claimed and recovered them from plaintiff, and the plaintiff procured officers to pursue and capture the thief. The officers making the arrest searched his person, and took therefrom certain money, and a watch which was of little value. It was held that the money and watch were liable to garnishment in the hands of an officer at the suit of plaintiff. In that case the search of the person was fully approved. It is said, however, in the opinion, that "a party to a suit can gain nothing by fraud or violence under the pretense of process, nor will the fraudulent or unlawful use of process be sanctioned by the courts. In such cases parties will be restored to the rights and position they possessed and occupied before they were deprived thereof by the fraud, violence or abuse of legal process." To the same effect, see Pomroy v. Parmlee, 9 Iowa, 140, and Patterson v. Pratt, 19 Id., 358.

We think the sheriff was justified in making the search, and in taking from the person all money or property which was in any way connected with the crime charged, or which might serve to identify the prisoner. If, however, the sheriff knew that the watches and money were in no manner connected with the crime, and that they

could not be used in any way as evidence in the prosecution, we think it was his duty to return them to the defendant. If a constable or other officer takes possession of property found on a prisoner, the court will order the same to be restored, if not required as a means of proof at the trial, or which does not finally appear to be the fruits of the crime with which he stands charged. 1 Archib. Crim. Pl. and Pr., 34, 35.

In the case of Reifsnyder v. Lee, supra, it is said, there was "ample ground to hold that the money taken from Lee was the money which he had procured from plaintiff for the stolen cattle."

In the case at bar, it is not claimed that the sheriff had any right to retain the money and watches for any purpose connected with the arrest or with the crime charged. It is claimed, however, that the defendant consented that the sheriff might take possession of the same and keep them for him. This is denied by the defendant, and there was a conflict of evidence upon this point, and it cannot be said that the court was not warranted in finding that the property and money were taken without the consent of defendant. Where a party submits to a search of his person by an officer, it cannot be said that the search was with his consent, because he makes no physical resistance; and, when the search is completed and the fruits thereof are retained by the officer, it would require a strong showing to hold that this was with the consent of the prisoner.

We think that it cannot be said that the search was unlawful. But when it was ascertained that the money and property were in no way connected with the offense charged, and were not held as evidence of the crime charged, the personal possession of the sheriff should be regarded as the personal possession of the prisoner, and the money and property should be no more liable to attachment than if they were in the prisoner's pockets. To hold otherwise would lead to unlawful and forcible searches of the person under cover of criminal process, as an aid to civil actions for the collection of debts. It does not appear that such was the purpose of the prosecution in this case, but the court was justified in finding that the money and property were taken from the defendant by force and without his consent, and, as it is not claimed that the money or property was in any way connected with the crime charged, no advantage should be taken of the defendant because the same was taken from his person by force and against his will.

Affirmed.

Section 5.
The Preliminary Examination, and Summary Trial of Nonindictable Offenses.

(a) The Preliminary Examination.

The magistrate must immediately inform the arrested person brought before him, of the offense with which such person is charged and of his right of counsel. When counsel for the defendant appears, or when sufficient time for that purpose elapses, the magistrate proceeds with the preliminary examination, unless this is waived by the defendant (5216 and see 5239), or a "change of venue" is demanded (5217) or proper cause for adjournment is shown (5218 and 5219). At this stage of the proceedings the defendant can obtain a "change of venue", meaning here the right to have the preliminary examination conducted by some other magistrate, by merely filling the proper affidavit (5217). The purpose of the preliminary examination is not to establish the guilt of the defendant, but merely to determine whether there is sufficient ground to bind him over to the grand jury; hence if his arrest was preceded by the indictment no preliminary examination is required. Sufficient ground to bind the defendant over to the grand jury is found if "it appears from the examination that a public offense, triable on indictment, has been committed, and there is sufficient reason for believing the defendant guilty thereof" (5230).

Cowell v. Patterson.

Supreme Court of Iowa, 1878. 49 Iowa. 514.

From a judgment in habeas corpus proceedings, that the plaintiff was not improperly restrained by the defendants, the plaintiff appealed.

Adams, J. - It is undoubtedly the right of a person brought before a magistrate for preliminary examination to waive the examination. It follows that in such case no examination should be held. The defendant must be considered as admitting, for the purpose of dispensing with the examination, and for no other, that the testimony, if taken, would be sufficient to justify the magistrate in holding him. The petitioner claims the right in this proceeding to raise the question of the sufficiency of the evidence to justify his being held. He relies upon section 3482 of the Code. That section provides that, in a proceeding upon habeas corpus, the petitioner may deny the sufficiency of the testimony to justify the action of the committing magistrate, and that, upon the trial, the testimony taken before the magistrate may be given in evidence in connection with any other testimony which may then be produced.

The Preliminary Examination, and Summary Trial of Nonindictable Offenses.

We infer that the judge who acted upon the petitioner's application refused to allow him to introduce testimony upon the ground that he waived the preliminary examination. Without stopping to inquire whether it was properly shown to the judge that such examination was waived, we have to say that, if waived, we think it should not preclude the petitioner from a hearing upon testimony in the proceeding upon habeas corpus. It is true that section 3482 provides for tendering an issue as to the sufficiency of the testimony to justify the action of the committing magistrate. Now, if the petitioner admitted, by his waiver, that the testimony, if taken, would be sufficient, it might seem that he should not afterward be heard to ayer to the contrary. But the same section provides that other testimony may be produced. So the real question to be tried is as to whether the petitioner ought to be held, in view of all the testimony that may be produced; and it is clear that the petitioner should be discharged, in view of such testimony, if it appeared that he ought not to be held, even if the testimony taken simply before the magistrate showed otherwise. The presumption against him arising from a waiver ought not to be stronger than in such a case. We think, therefore, that the judge erred in refusing to hear testimony.

.....Reversed.

State v. Wise.

Supreme Court of Iowa, 1891. 83 Iowa 596, 50 N. W. 59.

The defendant, having been convicted of rape, moved for a new trial. This motion has overruled and judgment was entered against him. The defendant appealed.

Given, J. - I. On the trial the appellant objected to the examination of Bertha Lillibridge and W. H. Caton on behalf of the state, for the reason that no minutes of the testimony of either were taken by the grand jury; that they were not witnesses before the grand jury; that no notice that their testimony would be taken had been served; and that what purported to be minutes of their testimony was not taken by any authorized authority, and was not proper to be considered by the grand jury. The objection was overruled, and the ruling is assigned as error.

It appears from the record that the defendant was held upon preliminary examination, to the grand jury; that upon the preliminary examination the justice called Mr. W. S. Harris to take the testimony of the witnesses; that Mr. Harris took it in shorthand, and afterwards transcribed it in type-writing, which copy the justice certified, and returned to the clerk of the court as the

minutes of the testimony before him in the case. Mr. Harris was not sworn to correctly take the testimony, nor to the correctness of the copy, but he testifies that the copy is a true statement of the minutes taken by him. Section 4293 of the Code requires that, "when an indictment is found, the names of all the witnesses on whose evidence it is found must be indorsed thereon before it is presented to the court, and the minutes of the evidence of such witnesses must be presented with the indictment to the court." Under section 4273, an indictment may be found "upon the minutes of the evidence given by witnesses before the committing magistrate." Section 4241 requires the examining magistrate to write out, or cause to be written out, the substance of the testimony given on the examination by each witness examined before him. It is not required that the person whom the magistrate may cause to write out the testimony shall be sworn, or that the minutes sent up by the magistrate shall be verified by his oath or signed by the witnesses. It is the substance of the testimony that is to be taken, and the magistrate, having heard the testimony, may certify that the minutes thereof taken by the person called by him are a correct minute of the substance of the testimony. The minutes of the testimony in this case were taken as authorized by law, and sufficiently authenticated to authorize the grand jury to act upon them, and to indorse the names of these witnesses upon the indictment. There was no error, therefore, in overruling the defendant's objections to the examination of these witnesses. State v. Rodman, 62 Iowa, 456.

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On another ground the judgment was -- Reversed.

(b) The Summary Trial of Nonindictable Offenses.

As the summary trial of nonindictable offenses has rather more in common with the preliminary examination than it has with the trial of indictable offense, it will be considered at this place.

If at the preliminary examination it appears that a public offense has been committed which is not triable on indictment and there is sufficient reason for believing the defendant guilty thereof, the magistrate shall order an information to be filed against the defendant (5237). If at the outset it had appeared that the offense was less than a felony, in which the punishment prescribed by law does not exceed a fine of one hundred dollars or imprisonment thirty days (5575), the proper procedure would have been to start, not with a complaint or "preliminary information" (5182), but with an

information, subscribed and sworn to, and filed with a justice of the peace (5570). But the only difference in fact would be that the complaint would charge an indictable offense while the information would not, because it is provided that the complaint may be substantially in the form required in criminal actions triable before a justice of the peace (5182. For the form see 5578). This information when filed would justify the issuance of a warrant for the arrest of the defendant, directed in the same manner as a warrant of arrest upon a "preliminary information", which warrant may be served in like manner (5580). There would be no difference in the arrest of the defendant, but when brought before the justice of the peace, if an information had been filed against him before that magistrate, "the charge against him must be distinctly read to him, and he shall be asked whether he is presented by his right name, and be required to plead" (5582), which he may do "the same as upon an indictment, orally or in writing" (5583). Before any testimony is heard the defendant may secure a change of the place of trial by filling an affidavit therefor (5585 and 5586)and he may demand a jury (5587) which will consist of six jurors (5596). If "the defendant is acquitted, either by the justice or by a jury, he must be immediately discharged" (5605); and if he is convicted he must be informed of his right to appeal to the district court (5612). From the judgment in the district court there is the further right to appeal "to the supreme court in the same manner as from a judgment in a prosecution by indictment" (5620). A failure of the justice of the peace to notify the defendant of his right to appeal does not deprive him of that right nor render the judgment void, Jacoby v. Waddell, 1883, 61 Iowa 247, 16 N. W. 119.

Zelle v. McHenry

Supreme Court of Iowa, 1879. 51 Iowa 572, 2 N. W. 364.

The plaintiff was arrested and taken before the Police Court upon an information charging him with the violation of a city ordinance. He first demanded a trial by jury and later moved for a change of venue both of which were refused. Having been convicted and committed to jail for a failure to pay his fine he obtained his discharge under a writ of habeas corpus. The defendants in that proceeding appealed.

Rothrock, J. - I. There are three questions presented in this record. They are - First, was the plaintiff entitled to a jury trial? Second, was he entitled to a change of venue? and, third, if the court erroneously denied either of these alleged rights, was its judgment void, and was the plaintiff properly released upn habeas corpus?

The Preliminary Examination, and Summary Trial of Nonindictable Offenses

We will determine these questions in the order in which they are stated. The Constitution of this State, in its first article, contains these provisions:

"Sec. 10. In all criminal prosecutions, and in cases involving the life or liberty of an individual, the accused shall have a right to a speedy and public trial by an impartial jury; to be informed of the accusation against him; to have a copy of the same when demanded; to be confronted with the witnesses against him; to have compulsory process for his witnesses; and to have the assistance of counsel.

"Sec. 11. All offenses less than felony, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days, shall be tried summarily before a justice of the peace, or other officer authorized by law, on information under oath, without indictment, or the intervention of a grand jury, saving to the defendant the right of appeal; and no person shall be held to answer for any higher criminal offense, unless on presentment or indictment by a grand jury, except in cases arising in the army or navy, or in the militia, when in actual service, in time of war or public danger."

Municipal corporations have power to make and publish ordinances, and to enforce obedience thereto by fine not exceeding one hundred dollars, or by imprisonment not exceeding thirty days. That a violation of an ordinance of this character is an offense less than felony we think must be conceded. True, it is not an offense against an act of the Legislature, but it is a violation of a valid enactment made in pursuance of law, and the punishment is inflicted by authority of the Legislature. These constitutional provisions cannot be evaded by imposing fines and imprisonment upon the citizen through an intervening agency, such as a municipal corporation. But the plaintiff was not entitled to a trial by jury by virtue of the provisions of the Constitution, because article 1, § 11 provides that all offenses in which the punishment does not exceed one hundred dollars, or thirty days imprisonment, shall be tried summarily before a justice of the peace or other officer authorized by law, saving the defendant the right of appeal. By saving the right of appeal to a court where the defendant may demand that he be tried by a jury, the provision is consistent with article 9 of the Bill of Rights, which declares that the right of trial by jury shall remain inviolate. The right to one jury trial is all that is guaranteed, and that is preserved by allowing an appeal to a court where the cause is to be tried anew, and by a jury. State v. Peneke, 8 Iowa, 203.

We are next to inquire whether the plaintiff was entitled to a trial by jury, by virtue of any statute law. The argument that there is statutory authority for a trial by jury in a police court, for the violation of a city ordinance, is based upon inference and not upon any express statutory enactment.

The Preliminary Examination, and Summary Trial of Nonindictable Offenses.

The city of Des Moines is a city of the first class, and by section 535 of the Code there is established in such cities a Police Court. By section 543 it is provided that "the police judge shall have, in all criminal cases, the powers and jurisdiction vested in the justice of the peace, ... and shall have jurisdiction of all violations of the ordinances of the city." By section 542 it is provided that the city council shall provide by ordinance for the selection, summoning and impaneling of juries for the Police Court. It is provided by section 4672 that in a trial of a criminal case before a justice of the peace the defendant may demand a trial by jury. No such provision is anywhere contained in the statute regulating proceedings in the Police Court. It does not follow, because a jury is provided for the Police Court, that a trial by jury may be demanded for the violation of a city ordinance. The jury must be held to have been intended for the trial of cases in the Police Court when authorized by law; that is, when the court is exercising the powers and jurisdictions of a justice of the peace in criminal cases. This jurisdiction embraces offenses against the laws of the State, in which a party is entitled to a trial by a jury of six men, as provided in section 4677 of the Code. Exercising the powers and jurisdiction of a justice of the peace in criminal cases does not include impaneling juries for the trial, of violations of the ordinances of the city.

An ordinance of the city provided that any person having been brought before the Police Court, upon information or otherwise, shall have the right to demand a jury. It is scarcely necessary to say that the ordinance could confer no right not authorized by statute. In other words, if the statute confers jurisdiction upon the Police Court for the trial of offenses against the ordinance of the city, and does not provide for a trial by jury, the city could not by ordinance confer such right.

We are unable to find any statutory authority for a trial by jury in a Police Court as organized under our law, and conclude that the court properly refused the demand for a trial by that method.

II. A change of venue, or as it has been more recently denominated a change of the place of trial, is purely of statutory origin. It has no recognition in the common law. If the right thereto exists it must be found in the statute, and here we have no statute authorizing a change from the Police Court in a criminal prosecution for a violation of a city ordinance. It is claimed that the venue should have been changed to a justice of the peace, not because there is any express statutory authority therefor, but because it is provided in section 4707 that proceedings in police and city courts, in criminal cases within their jurisdiction, shall be regulated by the provisions of the Code, when not otherwise regulated by law. The argument is that the proceedings should be

the same as before a justice of the peace. It is true there are provisions of the Code upon the subject of the change of the venue of actions. Some of these provisions are applicable to civil actions, others to criminal cases, and some apply to courts of record and others to inferior courts; but there is no warrant for the claim that the proceedings of any one court should be adopted rather than another. In this state of the law it must be held that the proceedings referred to could not have been intended to embrace proceedings for a change of venue.

In Jacquith v. Royce, 42 Iowa, 406, it was held "the jurisdiction of mayors of cities and incorporated towns over persons guilty of violations of municipal ordinances is not exclusive, and a justice of the peace may issue a warrant for the arrest of one charged with such offense, and detain him in custody till the day of trial." It is contended by counsel for appellee that under this rule, the jurisdiction being concurrent, a change of venue might properly be demanded either before a justice of the peace or a mayor. But the section of the statute construed in that case is applicable only to cities of the second class and incorporated towns. The Police Court in cities of the first class is another tribunal, created by different and distinct sections of the statute. In the case of French v. Marvin, 46 Iowa, 384, it was held that a change of venue may be taken from the court of a mayor of a city or an incorporated town to that of the justice of the peace. The opinion is based upon section 506 of the Code, which provides that the rules of law regulating proceedings before a justice of the peace shall be applicable to proceedings before such mayor. This section has reference to mayors of cities of the second class and incorporated towns. No reference is made therein to police courts, which, as we have seen, are a separate and distinct tribunal. There is no provision of law requiring the proceedings in the Police Court to be regulated by the law applicable to justices of the peace. It is true certain jurisdiction is conferred upon them concurrent with justices of the peace, but power and jurisdiction are essentially different from the form of procedure.

We might have disposed of this question in a very summary manner by simply following the rule of The State of Iowa v. Flinn, ante, 133, which holds that the overruling of a motion for a change of venue from the court of a mayor to a justice of the peace worked no substantial prejudice to the party charged, since he is allowed a new trial upon the merits in the District Court, and that the only remedy to correct the error was by appeal. But we have thought the public interests demand a settlement of the practice based upon a construction of the statutes, and our investigation leads us to the conclusion that the motion for a change of venue was properly overruled.

III. That the police court had jurisdiction of the subject-matter - that is, violation of the ordinance of the city - and that it had jurisdiction of the person of the party charged with such violation, and that the judgment rendered by the court was such as was authorized by the ordinance, must all be conceded. The judgment was, therefore, not void, and habeas corpus will not lie to correct errors of a court having jurisdiction on the subject-matter and the person charged. If the court had jurisdiction of the case, "mere irregularities or errors of judgment in the exercise of that jurisdiction must be disregarded on this writ, and must be corrected by the court issuing the process or on regular appellate procedings." Cooley's Const. Limitations, 347.

Reversed.

State v. Sipult.

Supreme Court of Iowa, 1864. 17 Iowa 575.

Lowe, J. - Information for petit larceny upon which the defendant was convicted. He relies, in this court, upon the following points:

1. That the original information is defective, in not charging that the larceny had been feloniously committed. The language of the accusation is in the words of the statute (§4237), that the defendant did steal, take and carry away, &c. This is all that is required in an information before a justice of the peace. The information in this case is fully up to the requirements of the statute, and very well drawn.

2. That the magistrate had no jurisdiction to try the cause, for the reason that although the property said to be stolen was worth less than twenty dollars, it was taken, if at all, in the night season, from the stable of the prosecuting witness, and the offense was therefore indictable. The words of the statute (§4238) are: "if any person in the night time, commit larceny in any dwelling house, store, or any pubic or private buildng," &c. It may well be doubted whether a stable falls under the description of building above designated.

The charge in the information is not that the larceny was committed in the night time from a stable or other building, but that the defendant stole, took and carried away a set of harness, the property of the prosecuting witness, on a certain day. It is only from the evidence that we learn that it occurred at night and

from a stable. There is nothing therefore appearing affirmatively on the face of the proceedings that shows a want of jurisdiction; and the defendant is not to be heard to allege, under such circumstances, that he has not been prosecuted for the greater instead of the lesser offense.

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Affirmed.

State v. Bitman.

Supreme Court of Iowa, 1862. 13 Iowa 485.

Baldwin, C. J. - The information upon which the defendant was arrested, tried and convicted, charges him with cruelly and inhumanly whipring and beating his own child, being about three years old.

A demurrer to this information was filed in the justice's court presenting several objections to its sufficiency, only two of which we deem it important to consider: first, because it did not charge the public offense of assault and battery; second, because the name of the person upon whom the offense was said to have been committed was not given.

This demurrer was overruled by the justice, and the bill of exceptions shows that upon appeal the same objection was made and overruled in the District Court.

The information is not objectionable upon the first ground named. The language used is sufficient to indicate that the offense had been committed. It is not required that the information should state in so many words that the defendant was guilty of the offense of an assault and battery. It is the right of a parent to chastise his child, but when such chastisement amounts to cruelty or inhumanity, or where, as the court below charged the jury, the parent or master goes beyond the line of reasonable correction, his conduct becomes more or less criminal.

Cruelly and inhumanly whipping implies an unlawful and willful assault and battery. Any words used in the information which substantially and plainly set forth the acts of the defendant which amount to an offense, are sufficient.

The second objection is, that the name of the person upon whom

the offense was committed is not given. This omission renders the information defective. It would, without doubt, invalidate an indictment, if the State should fail to allege therein upon whom the offense had been committed.

The form of an information, as given in §5058, of the Revision, seems to contemplate that the act or omission constituting the offense with the venue and names and date, should be stated with as much precision as in an indictment. The defendant should be advised of the name of the person upon whom the assault has been committed, so that he can prepare his defense accordingly.

The information should be so specific that if the defendant is so convicted or acquitted he could plead such conviction or acquittal in bar of any further prosecution for the same offense.

Reversed.

Town of Bayard v. Baker.

Supreme Court of Iowa, 1888. 76 Iowa 220, 40 N. W. 818.

The defendant, having been convicted in the mayor's court of the violation of an ordinance of the town, appealed to the district court. From a judgment of conviction there he appealed to the supreme court.

Seevers, C. J. - .....

VII. The ordinance provides "that any person, who shall stand any jack, stallion, or bull, or try to let any jack, stallion, or bull, to any mare or cow, ...unless within an inclosure so arranged as to obstruct the public view, and in such place as to prevent the noise thereof from disturbing the public or private families or persons within the town," he should be punished as prescribed in the ordinance. The ordinance introduced in evidence was designated as "No. 21," and the information was entitled, "The incorporated town of Bayard v. Frank Baker, before Thos. Stevenson, mayor of the incorporated town of Bayard, county of Guthrie, and state of Iowa," and it proceeded to state that "the defendant ..... is accused of the crime of violating ordinance No. 21, for that the said defendant, at the town of Bayard ..... did, ... against the peace of the state of Iowa, and contrary to the provisions of ordinance No. 21, entitled 'An ordinance' .....passed the twenty-first day of March, A. D. 1888, in such cases made and provided, and against the peace and dignity and good order of said town of Bayard." It is objected that the

information is insufficient because it does not appear that any or what town or city passed the ordinance. It is true that it does not so appear in express words, yet we think theinformation is clearly sufficient. Any person of ordinary understanding, reading the information, would readily reach the conclusion that the defendant was charged with violating ordinance No. 21, passed by the incorporated town of Bayard. The same strictness is not required in an information for violating an ordinance as in an indictment (1 Dill. Mun. Corp. sec. 414); and we incline to think the information is sufficient under Code, section 4305.

VIII. The standing, or letting, or trying to let, any jack, stallion, or bull to any mare or cow is not prohibited, unless the same be attempted at an improper place. The offense consists in doing the prohibited act at such place. Therefore the information does not charge two offenses, and is direct and certain; the charge being that the defendant "did then and there let or try to let a stallion serve a mare," for the reason that such acts do not constitute any offense unless the same was done at a prohibited place, which it is not claimed is not properly charged in the information.

IX. There are other objections made to the information of a similar character, none of which, in our judgment, are well taken. All the points made by counsel are exceedingly technical, and without substantial merit. It is also said that the verdict is not sustained by the evidence. We think differently.

Affirmed.

Baurose v. State.

Supreme Court of Iowa, 1855, 1 Iowa 374.

The defendant, having been convicted by a justice of the peace on a charge of unlawfully selling liquor, appealed to the district court which affirmed the judgment of the justice, on motion, and denied the defendant's motion for a new trial. The defendant then took the case to the Supreme Court on writ of error.

Isbell, J. - The first and second specifications of error, resolve themselves into the same question, viz: whether the District Court erred in refusing the defendant a trial by jury? So far as the waiver of that right by the defendant is concerned, it appears that the question propounded by the court, viz: whether either party desired a jury, was asked at a stage of the cause, where a jury could take no part; that is to say, on the hearing of

a motion. We cannot, therefore, consider the defendant's right to be tried by a jury as waived by him; and if he would be entitled to it on other ground, it should not now be refused him.

The question whether he was or was not entitled to such trial, involves a construction of sections 3358 and 3361 of the Code, as to what is the duty of the District Court, when an appeal comes before it from the trial of a justice in case of a misdemeanor, on the alleged ground that the evidence did not justify the conviction. And on this point, we should have little hesitation in pronouncing, were it not, that a construction has already been given to this statute, in this particular, by the former bench, which we are unwilling to adopt.

In Kuner v. The State, decided at the December term, 1854, Hall, J., in delivering the opinion of the court, says: "where a party charged with a criminal offense, appeals upon the alleged ground that the evidence would not justify the conviction, he is entitled to a trial de novo in the District Court." If it is meant by this (which the case there seems to indicate), that the defendant, on an appeal from a justice of the peace, on the trial of a misdemenaor, on such alleged ground, is entitled to a trial de novo in the District Court, as a matter of common right, in the absence of all showing that the evidence on the trial was insufficient to justify the conviction; or, in other words, that when the appeal is on that alleged ground, in the absence of such showing, the District Court has not the right to deny such trial, we cannot conclude that such is the meaning of the statute.

It is clear from section 3361, that the appeal addresses itself to the court in the first instance, and that a judgment of the court is contemplated, before a new trial can be had. The language, "may order a new trial," contemplates a right to refuse such trial. No distinction is made by the statute, on account of the ground of appeal, as to whether it be for error in matter of law or fact. Section 3358, contemplates in case of an appeal, that an affidavit shall be made stating the facts showing the alleged errors, a requirement which would seem unnecessary, unless to use in the court above, to inform the court of the probable ground of error in fact.

The language of these two sections entire, is as follows:

"Sec. 3358. The defendant may appeal to the next term of the District Court, if on the rendition of the judgment, he, or some one for him, make or cause to be made an affidavit stating the facts showing the alleged errors in the proceedings or conviction complained of, and that he verily believes that injustice has been done."

The Preliminary Examination, and Summary Trial of Nonindictable Offenses

"Sec. 3361. After hearing the appeal, the court shall give judgment without regard to technical errors or defects, which have not prejudiced the substantial rights of the defendant, and may render such judgment as the magistrate should have rendered, or may, according to the justice of the case, affirm or reverse the judgment, in whole or in part, as to all or any of the defendants, if there be more than one, or may order a new trial."

The language of the latter section, is in substance the same as that in sections 3097 and 3098, prescribing the duty of this court, on the hearing of a writ of error to the District Court. The language there used is, "must give judgment without regard to technical errors or defects, which do not affect the substantial rights of the parties. May reverse, affirm, or modify the judgment of the District Court, or may, if necessary, order a new trial." Yet, if we were to attempt to adopt the doctrine in this court, that if the error complained of was, that the evidence did not justify the conviction, the defendant would be entitled to a trial de novo, without showing probable error in fact, it would at least be considered unsound.

But it is said, that to refuse a trial de novo, violates the right of trial by jury; that when the constitution says, that in all criminal prosecutions, the accused shall have a right to a speedy trial by an impartial jury, this means a common law jury of twelve men. This, perhaps, might be true, were it not also for the provision of the constitution, that the General Assembly may authorize trial by a jury of less number than twelve men in inferior courts. It is sufficient that the accused was tried by a constitutional jury. To assume that no offense may be tried by a jury of a less number than twelve, would be to oust justices of the peace, as the law now stands, of all jurisdiction in such cases; for being inferior courts, the statute confers their powers, and as there is no authority for their summoning a jury of twelve, and as the accused is entitled to be tried by a jury, the trial of any given case by a justice might be entirely prevented - an extremity in which we see no need of being placed. As we understand the statute, it is the duty of the District Court, on an appeal in such case coming up, to first inquire into the case made by the appellant, and determine whether error, prejudicial to the substantial rights of the defendant, exists. In this inquiry, the presumptions are in favor of the correctness of the proceedings. If the defendant fails to show probable error before the justice, it is the duty of the court to affirm the judgment. If the alleged ground of appeal is, that the evidence did not justify the conviction, the defendant, either by his affidavit, made for the purpose of appeal, or by bill of exceptions taken on the trial, should bring the evidence so before the court, as to render error at least probable; and in case he does not do so, the court should affirm the judgment. Nor is there any hardship in requiring this, the accused being entitled to counsel.

Regarding the duty of the court in this light, let us turn to the case before us, and see if the defendant made such a shewing of probable error in fact, as to render it error in the court to refuse him a new trial. From the whole record, including the affidavit for appeal, we conclude that the insufficiency of evidence complained of as error, is in this, that the evidence did not justify the jury in concluding that the liquors sold were intoxicating. The affidavit, which is all the evidence on that point, is as follows: "Dr. Fairfield came in and called for brandy, and S. M. Phelps called for rum; that Dr. Fairfield poured out of a bottle what looked like brandy, into a glass, and drank it; and that the said Phelps poured out of a bottle into a glass something, and drank it, and that the bottle was labelled 'Rum;' and this was all the knowledge of said witness that either of the liquors drank by said Fairfield and Phelps, was intoxicating liquor."

Under this state of the evidence, disclosed by the defendant in his affidavit, without more, as that Fairfield or Phelps objected, that what was given them was not that which they called for, or something at least leading to a conclusion in this direction, we think there is not ground for a reasonable doubt but that they drank that which they called for; or, in other words, that the liquors sold were intoxicating liquors, to-wit: brandy and rum. We therefore conclude, that there was not probable ground of error on the part of the court in affirming the judgment.

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So much of the judgment as affirmed the judgments of the justice was affirmed - another part of the judgment was reversed.

State v. Valure.

Supreme Court of Iowa, 1895. 95 Iowa 401, 64 N. W. 280.

Robinson, J. - .....

The grounds of the motion to dismiss filed in the district court were not the same as the one made in justice's court, and the record does not show clearly that the allegations of fact upon which the former is based are true. By treating them as true, and the questions raised as properly presented in the district court, we must hold that the motion was rightly overruled. The correctness of the ruling must be determined by the law of this state. The alleged errors which were committed in justice's court were not of a character to affect any substantial right of the

defendant. Section 4702 of the Code provides that when an appeal is taken from a justice's court in a criminal case the cause appealed shall stand for trial anew in the district court in the same manner that it should have been tried before the justice, without regard to technical errors or defects which have not prejudiced the substantial rights of either party. The next section provides that no appeal from a justice's court shall be dismissed. Under these provisions the alleged failure of one of the justices to make proper and timely entries had no effect upon the rights of the parties after the appeal to the district court was taken. The authorities cited in support of the claim of the appellant on this branch of the case are from other states, and relate chiefly to civil cases.

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Affirmed.

Town of Lovilia v. Cobb.

Supreme Court of Iowa, 1905. 126 Iowa 557, 102 N. W. 496.

The defendant appealed to the district court from a conviction before a magistrate on a charge of violating an ordinance of the plaintiff town. A demurrer, filed by the defendant in the district court, was overruled after the plaintiff had been permitted to file an amendment to the information. The defendant was then tried and convicted, and from the judgment of conviction he appealed.

Deemer, J. - .....

III. Next it is argued that the mayor who originally tried the case had no jurisdiction - First, because the information was not marked filed by him; and, second, because it did not locate the place where the offense is said to have been committed. The first point is without merit. True, the original information was not marked filed; but this was not essential to give the magistrate jurisdiction. It was in fact sworn to before the mayor, and left with him as an information. He treated it as such, and acted thereon. On that defendant was convicted, and from the judgment thereon he appealed. This shows a sufficient filing. State v. Briggs, 68 Iowa, 416; State v. Guisenhause, 20 Iowa, 227.

The sufficiency of the information in its charge as to the location of the place kept by the defendant was not challenged until the case reached the district court. Upon such challenge being interposed, plaintiff filed an amendment to the information, making

the charge in this respect specific. That an information may be amended is too well settled to require the citation of authorities, and the amendment may be made after appeal to the district court. State v. Merchant, 38 Iowa, 375; State v. Doe, 50 Iowa, 541; State v. Reilly, 108 Iowa, 736.

IV. Next it is argued that the amendment to the information was not verified. This point does not seem to have been made in the district court. Moreover, the amendment appears to have been sworn to before the mayor. But it is said that the mayor was outside of his jurisdiction when he administered the oath. The presumption is otherwise, and this presumption is not rebutted by anything in the record.

V. In a reply argument defendant contends that he was entitled to a jury trial in the district court, and that this right could not be waived. This point, even if properly raised, is settled adversely to defendant in State v. Ill., 74 Iowa, 441. Conceding, arguendo, that the proceedings are criminal in character, yet as they are to be tried in the same manner, both originally and on appeal, as proceedings before a justice (Code, section 692), defendant could waive a jury on his appeal.

VI. Lastly, it is argued that there is no evidence to support a conviction. In answer to this it is sufficient to say that we find ample evidence to sustain the charge.

There is no error, and the judgment is affirmed.

Section 6.

Discharge, Commitment and Bail.

If, as a result of a summary trial for a nonindictable offense the defendant is acquitted, either by the justice or by a jury, he must be immediately discharged (5605) and has the benefit of the rules of former jeopardy. But if the discharge is because, on preliminary examination, the magistrate does not find that any offense has been committed, or finds that an offense was committed but that there is no sufficient reason to believe the defendant guilty thereof (5229), there has been no judgment of conviction or acquittal and the rules of former jeopardy do not apply. If the result of the summary trial is that the defendant is convicted, or if he pleaded guilty, " the justice shall render judgment thereon of fine or

imprisonment, as the case may require" (5603). Unless appeal is taken "the judgment shall be executed by a peace officer of the county where the conviction is had, by virtue of a warrant under the hand of the justice, specifying the particulars of such judgment" (5608). When, as the result of a preliminary examination, the defendant is held to answer the charge filed against him, he is admitted to bail unless the offense is not bailable (5230), and see 5096). But if the offense is not bailable, or he is unable to give bail he is committed to jail (5230 and 5231). The problems of bail will be discussed under the chapter dealing with the Steps of the Defendant.

Each material witness for the state is required to enter into a written undertaking to appear and testify at the defendant's trial (5232), and may be required to give security therefor (5233). If any witness refuses to comply with such borders he must be committed by the magistrate (5235). The magistrate must then "return to the district court of the county, on or before its opening, on the first day of the next term thereof, and as soon after the closing of the examination as practicable, all the papers filed in the proceeding, including therewith the minutes of the evidence, together with the undertaking of bail for the appearance of the defendant, and the undertakings of the witnesses or for them, taken by him". (5236).

CHAPTER V.

THE INDICTMENT

Section 1.

The Finding and Presentation by the Grand Jury.

The grand jury, one of the ancient English institutions, is a body of men summoned from all parts of the county to pass upon accusations of crime therein. The number was variable at commom law, but could not exceed twenty-three nor be less than twelve. The Constitution of Iowa says (Article 5 Section 15) that "the grand jury may consist of any number of members not less than five, nor more than fifteen, as the general assembly made by law provide." The provision made by the general assembly was that the grand jury shall consist of seven (5240. For the statutory provisions as to preparation of lists and method of drawing see Compiled Code, §§ 6992 tp 7030 inclusive and §§ 9299, 9300 and 9307). "All qualified electors of the State, of good moral character, sound judgment, and in the full possession of the senses of hearing and seeing, and who can speak, write and read the English language, are competent" to serve upon the grand jury (332), but the law expressly exempts certain persons from liability to act as jurors. (Supp. 13, § 333) and sets forth what circumstances will constitute an excuse for others (334). "From the persons impaneled as grand jurors the court must appoint a foreman" (5248) to whom a special oath is administered (5249). The other grand jurors are sworn to "well and truly observe" "the same oath" (5250). The grand jury is then charged by the court (5251) after which it proceeds to "inquire into all indictable offenses which may be tried within the county." (5253). Witnesses may be required to attend under subpoenas issued by the clerk of the court (5262; and see 5271, 5270, and 5255), and the county attorney may attend for the purpose of examining witnesses (5264) or giving information (5265); but no person but the grand jurors shall be present when the vote is taken upon the finding of an indictment (5265).

A bill of indictment is a written accusation of crime drawn by the prosecuting attorney and submitted to the grand jury. If this bill is found and presented by them upon oath or affirmation as a true bill, it then becomes an indictment and the accused stands indicted. The concurrence of at least twelve grand jurors was necessary at common law, but under our Code the concurrence of five is sufficient (Supp. '13, § 5274a). If there are not five grand jurors who vote that the bill of indictment shall be found to be a true bill, they "ignore"it, whereupon it does not become an indictment and the accused person is not indicted. If the grand jury of their own knowledge, or of their own motion on information from others, take notice of a public offense it is called a presentment. By general practice at common law, this presentment came to be regarded as a mere instruction to the prosecuting attorney to draw a bill of indictment. If such bill was drawn by him and found by them to be a true bill, this indictment became the basis

of the prosecution. In some other jurisdictions it has been held that a prosecution can be based upon such presentment without any indictment or information (State v. Hunter, 1845, 5 Humphr. (Tenn) 597). It is probable that it was because of this notion that we find in the Constitution of Iowa (Article 1, Section 11) language to the effect that no person shall be held to answer for certain offenses "unless on presentment or indictment by a grand jury". But this wording disappeared in amendment (in 1884 - the amendment was inserted as section 15 of article 5) and it has not been the practice in this state to use this presentment in lieu of an indictment. The result has been a tendency to use the word "presentment" for another purpose. It is the duty of the grand jury to inquire into all indictable offenses which may be tried within the county and "present them to the court by indictment" (5253). In the foreman's oath (5249) this is referred to as "presentment". As so used it has reference to the presentation of the indictment to the court. (And see 5267).

State v. Tucker.

Supreme Court of Iowa, 1866. 20 Iowa 508.

An indictment having been set aside on motion of the defendant, the state appealed.

Dillon, J. - The record shows that five witnesses, in addition to the said Philomela, gave competent evidence before the grand jury, and sufficient, even if hers was excluded, to justify and even require them to find a bill. To sustain the ruling of the court, the defendant's attorney cites us to subdivision 4 of section 4691 of the Revision, which provides that the indictment shall be set aside "when any person other than the grand jurors was present before the grand jury during the investigation of the charge, except as required or permitted by law."

It is not claimed that the wife "was present before the grand jury during the investigation of the charge" against the indictees, except when being examined as a witness.

But the objection is, that she was present as a witness; and the argument to support it is, that being the wife of one of the defendants on a joint charge and indictment, she was incompetent as a witness (Rev. §3983); that being incompetent as against her husband, she is likewise incompetent as against any co-defendant (1 Greenl. Ev., §§ 334, 335); that from the nature of the charge she cannot testify against her daughter, without at the same time implicating her husband; that being for these reasons incompetent as a witness, she was "neither required or permitted by law" to be present during the investigation before the grand jury. It is

not necessary to decide whether the wife is a competent witness against her husband or her daughter. Even if it be admitted that she is not, still this constitutes no ground for setting aside the indictment. The section of the Revision cited (4691, sub-div. 4), has no reference to such a case.

Its object is to exclude outsiders or spectators from the grand jury room.

Whether witnesses are competent is often a very difficult question of law, and to hold that if the grand jury, in the course of their investigation, happen to examine an incompetent witness, that this will have the effect to vitiate their finding, is going a step further than we are prepared to take. The motion of the daughter to set aside the indictment should have been overruled.

Reversed.

State v. Clapper.

Supreme Court of Iowa, (1882). 59 Iowa 279, 13 N.W. 294.

The defendant appealed from a conviction of the crime of taking goods and chattels from the custody of an officer.

Seevers, Ch. J. - The attorney-general has filed an amended abstract which, as we are advised, has been served on the defendant, who has made no response thereto. Under such circumstances such abstract must be deemed true. This being so, there are but two questions that can be considered by us.

The first is whether the court erred in overruling the motion to set aside the indictment. It appears a previous indictment had been found for the same offense which, for some reason not disclosed by the record, was set aside and the cause referred back to the grand jury. In the absence of any showing to the contrary, the foregoing action of the court must in all respects be presumed to be correct.

As we understand, the present indictment was found on the minutes of the evidence attached to the first indictment and one additional witness who was examined before the grand jury. The motion to set aside the indictment, among other reasons, was based on the fact that all the witnesses upon whose evidence the indictment was found were not examined by the grand jury. But this is a mistake. Both indictments were found by the same grand jury, and therefore the witnesses were examined by such jury. When the first indictment was found the grand jurors heard the evidence, and saw the witnesses, and there was no necessity to hear or see them

again. Several other reasons are assigned in the motion as grounds for setting aside the indictment, but in the state of the record the foregoing is the only one that can be considered.

The second question we are called upon to consider is as to the sufficiency of the indictment. It was found under section 3915 of the Code, and substantially charges a crime as defined by the statute. We are unable to discover any objection thereto. The most precious grounds assigned in the demurrer is that the sheriff from whom the property was taken was alleged to be the owner thereof. This, we think, is correct because the sheriff was a bailee in possession.

Affirmed.

State v. Osborne.

Supreme Court of Iowa, 1883. 61 Iowa 330, 16 N. W. 201.

From a conviction of first degree murder the defendant appealed.

Beck, J. - I. The prisoner was held to answer before the grand jury for the crime for which he was indicted, and, in the exercise of the right conferred by statute, challenged a grand juror, on the ground that he had formed and expressed an opinion of defendant's guilt. See Code, §§ 4258 and 4261. The challenge was sustained, and the court, under § 4264, directed that the juror objected to should not be present at or take any part in the consideration of the charge against the prisoner. This direction was disobeyed, and the juror was present during the consideration of the case by the grand jury. Upon the return of the indictment, it was set aside upon motion of the prisoner, based upon the misbehavior of the juror just stated. Thereupon the court, against defendant's objection, re-submitted the case to the same grand jury, again directing the juror who had been challenged to take no part in the consideration of the charge against the prisoner, and not to be present when the case should be considered. The prisoner asked permission to challenge the grand jurors to whom the case was finally submitted, on the ground that they had formed and expressed an opinion of his guilt. This was denied, and the ruling constitutes the only ground of error that need be considered upon this appeal.

II. Code, § 4261, conferring upon the prisoner the right of challenging grand jurors on the ground of opinions, formed and expressed, of his guilt, does not prescribe the time within which the right shall be exercised. Nor does it prescribe that, if the right be exercised, and one or more of the jurors be challenged,

further challenges shall not be made, when ground therefor arises after the first challenge. In the absence of any statute so providing, the prisoner ought to be permitted to exercise the right to challenge the jurors at any time before they consider the case, upon information gained that they are lawfully subject to challenge on account of matters arising after a prior challenge had been made. A different rule would defeat the very purpose of the statute namely, to secure a fair and unprejudiced grand jury, to whom the charge shall be submitted. In the case before us, after the first indictment was set aside, the rights of the prisoner were no other or different from what they were when the first challenge was made. He had a right to an unprejudiced grand jury. The proceedings resulting in the first indictment stood for nothing. The prisoner should have been permitted to fully exercise his right to challenge the jurors. There was ground for believing, nay, for knowing, that the jurors had formed and expressed an opinion of the prisoner's guilt, for they had heard the evidence, and upon their oaths returned an indictment against him. But, it is said, they gained the knowledge of the facts, and expressed their opinion of his guilt, acting as grand jurors. This does not change the case. Suppose one of the grand jurors had been upon a coroner's jury, or had been upon a jury before whom an accomplice had been tried and convicted. In each case the juror would have gained knowledge of the facts, and expressed an opinion of the prisoner's guilt, under circumstances substantially the same as existed in this case. It will not be claimed that he would not be the subject of challenge. It is also said that no prejudice resulted from refusing defendant the right to make the challenge, as he was convicted, and thus shown to be guilty; and that we must presume another grand jury would have found an indictment against him. The facts stated may all be admitted, but we cannot exercise a presumption of a prisoner's guilt in order to sustain proceedings resulting in his conviction. Such a rule would, in effect, declare that a verdict cures all violations of law and irregularities in criminal trials. The State v. Gillick, 7 Iowa, 287, supports the conclusions we have announced.

III. It is insisted that, as the courts may resubmit the cause to the same grand jury, under the provisions of Chap. 130, Sec. 5, Acts of the Eighteenth General Assembly, (Miller's Code, p. 1008, and McClain's Statutes, p. 1067,) this provision would be defeated if the prisoner may challenge the grand jurors on the ground of knowledge derived, and an opinion expressed, in proceedings resulting in a prior indictment. But this provision must be construed in harmony with other statutes, and it must be understood as directing that a charge may be resubmitted to a grand jury, to be examined under the rules elsewhere prescribed. In this view, the right of challenge is not abridged.

IV. The State v. Fowler, 52 Iowa, 103, is cited by the attorney-general in support of the position that, as no prejudice was shown in refusing to defendant the right to challenge the jurors, the defendant cannot now complain. In that case it was proper to presume

that no prejudice resulted from a failure to afford the prisoner an opportunity to challenge a grand juror, who took the place of one who was excused from the jury, in the absence of any showing or ground of inference that a cause of challenge existed. But in this we must presume that there was good cause for challenge of the jurors, on the ground that they had formed and expressed an opinion of the prisoner's guilt. The State v. Felter, 25 Iowa, 67, is in the same manner distinguished from this case. There was no ground upon which prejudice could be presumed in that case. In this case, as we have said, there is ground to presume that the grand jurors had formed and expressed an opinion of defendant's guilt, and they were, therefore, under the law subject to challenge. The right of the prisoner to have the charge considered by a grand jury of the character contemplated by the statute cannot be denied.

The judgment of the district court is reversed. But the defendant will remain in custody to await the action of the grand jury, and the cause will be remanded to the district court for an order resubmitting the charge to the grand jury.

Reversed.

State v. Harris.

Supreme Court of Iowa, 1919. - Iowa - 172 N. W. 942.

The defendant appealed from a conviction of the crime of having maliciously threatened a certain person.

Ladd, C. J. An indictment was returned against the accused September 4, 1918, and two days later he moved that it be set aside for that one Schmidt, who had been regularly drawn and summoned as a grand juror, had failed to appear, and in his stead one Miller acted as member of said grand jury. This motion was confessed by the county attorney September 10, 1918, and the court ordered the indictment set aside and "that the case be submitted to the grand jury at the October term, 1918." At the October term the grand jury was impaneled with W. W. Reynolds, Henry Hansman, and Wm. Miller as members thereof, who had also served as members of the grand jury which returned the indictment set aside.

The accused challenged each of these persons for that, as was contended, he had "formed or expressed such an opinion as to the guilt or innocence of the prisoner as would prevent him from rendering a true verdict upon the evidence submitted on the trial" (section 5243, Code), and each challenge was overruled.

Reynolds had answered that he had no acquaintance with the accused save as he appeared before the previous grand jury, and that all he knew about the case was what he had heard at that time; that he then formed and expressed a positive opinion as to the merits of the case, and still had it; that it would prevent him from rendering a true verdict if the evidence was the same as before the grand jury at the previous term of court; that his opinion would be as then expressed unless he had some reason to change it, and that he then voted to return an indictment. Thereupon the court elicited the fact that he was not prejudiced against the accused and could listen to the testimony "with relation to finding an indictment or not without any passion or prejudice or feeling against" him, and that he could "return such a verdict as he believed the evidence warranted." Thereupon the challenge was overruled.

Hansman and Miller testified practically the same as did Reynolds, save that on examination by the court Hansman said that he did not mean to say that he had any opinion as to the guilt or innocence of the defendant, though he had testified that, "if the evidence were the same as was submitted before, he would vote the same way," and declared that he had "formed a positive opinion as to the merits of the case." Miller swore that the fact that he had voted for an indictment before would have an influence on his vote again.

It is apparent from the court's ruling that too much significance was given to the fact that these men could proceed without any feeling or bias against the accused. This is not enough to qualify the juror. The test prescribed is whether such an opinion had been formed or expressed concerning his guilt or innocence as would prevent them from rendering a true verdict. Each declared in the most positive manner that he had formed and expressed such an opinion. The finding and return of an indictment confirmed this, and there was no room for ruling otherwise. The challenge should have been sustained. See State v. Osborne, 61 Iowa, 330, 16 N. W. 201, where every point raised is ruled adversely to the contentions of the state. See, also, State v. Gillick, 7 Iowa, 287, and State v. Pullard, 127 Iowa, 168, 102 N. W. 1120.

The judgment of the district court is reversed, but the defendant is continued in custody, and the cause remanded to the district court for such order with reference to resubmission to the grand jury as may be deemed appropriate.

Reversed and remanded.

Hobson v. District Court of Linn County.

Supreme Court of Iowa, 1920, - Iowa - 177 N. W. 40.

A witness refused to give testimony before the grand jury upon the ground that the evidence sought was immaterial and not germane to any matter then under investigation before that body. Having been ordered committed to the county jail until such time as she signified a willingness to testify, she instituted proceedings for certiorari to test the authority of the court to make such order.

Stevens, J.- After being duly sworn by the foreman as a witness before the grand jury of Linn county, plaintiff declined to answer the following questions:

(1) In what business is your son Leo Hobson now engaged? (2) State to the grand jury where your son Leo is at the present time, and anything you know of his present whereabouts.

She was brought into open court by the grand jury, and, in the presence of all the members thereof and at the request of its foreman, the county attorney informed the court that the witness refused to answer the above questions, and that in the opinion of the grand jury, both interrogatories were important, pertinent, and material to certain matters then under investigation before that body. Nothing was disclosed by the county attorney or grand jury as to the subject or nature of the investigation referred to, and no inquiry was made by the court in relation thereto.

Counsel appeared for plaintiff, and objected to the questions on various grounds, among which were that the evidence sought was immaterial, not pertinent to any matter pending before the grand jury, and did not tend in any way to prove the commission of a criminal offense by Leo Hobson or any other person, or that evidence as to his whereabouts would tend in any way to aid the jury in its investigation of offenses committed within the county of its jurisdiction. The objections were overruled, and the witness directed to answer. Persisting in her refusal to do so, she was by the court ordered committed to the county jail until such time as she signified a willingness to comply with the order of the court.

The grand jury is an appendage or constituent part of the court, exercising certain limited powers and duties under its instructions and direction, but also exercising certain other powers and duties independent and beyond the control of the court. It is its duty to diligently inquire, and true presentment make, of all offenses committed or triable within the county of its jurisdiction, of which it has or can obtain legal evidence.

Its proceedings are conducted secretly and with the assistance of the county attorney, and it may request, and receive, advice from the court. It has no power to compel the attendance of witnesses, or to punish them for refusing to answer questions propounded to them. Subpoenas are issued from the office of the clerk and the attendance of witnesses before it may be enforced by the court in the same way as witness served with a subpoena to testify in any matter pending before it. The power to punish a witness for refusing to testify before a grand jury is, by section 4461 of the Code, conferred upon the court. The proceedings in case of the refusal of a witness to testify before that body and the nature of the hearing before the court are set forth in section 5270 of the Code as follows:

"When a witness under examination before the grand jury refuses to testify or to answer a question put to him, it shall proceed with the witness into open court, and the foreman shall then distinctly state to the court the question and the refusal of the witness, and if upon hearing the witness the court shall decide that he is bound to testify or answer the question propounded, he shall inquire of the witness if he persists in his refusal, and, if he does, shall proceed with him as in cases of similar refusal in open court."

It will be observed from the provisions of the foregoing section that after the witness has been brought into court the foreman shall then distinctly state the question or questions propounded to the witness, and inform the court of its refusal to answer the same; then "if upon hearing the witness, the court shall decide that he is bound to testify or answer the question propounded, he shall inquire of the witness, if he persists in his refusal, and, if he does, shall proceed with him as in cases of similar refusal in open court." Technically, the contempt of which the witness is guilty is the violation of the authority and dignity of the court, but committed in the presence of the grand jury. The grand jury is the instrumentality by which evidence of the violation of criminal statutes is obtained and presentment made to the court, and no doubt wide latitude must be allowed it in the exercise of its inquisitorial powers, and its efficiency should not be curbed or circumscribed by technical rules of evidence with which members thereof ordinarily have little or no familiarity. Nevertheless, indictments should be founded on legal evidence. State v. Tucker, 20 Iowa, 508; State v. De Groate, 122 Iowa, 661, 98 N. W. 495. The informalities observed in the rules of evidence by grand juries and the wide latitude allowed them in the exercise of their inquisitorial powers should never be permitted to become the instrument of oppression, or be used for any other purpose than that of obtaining information as to indictable offenses triable within the county in which the grand jury is sitting, or other lawful purposes, nor should the witness be his own judge as to whether he will answer or not, but the power of the court is ample to prevent abuse of the prerogatives of either grand jury or witness, and to enforce all necessary rules for the proper and efficient performance of the duties of

of the grand jury. It would, to say the least, be a grave injustice to commit a witness for contempt of court for refusing to answer questions having no materiality or relationship to any matter pending before it, or forming the subject of its investigation. Such evidence is not legal evidence within the meaning of the law. The right of the grand jury to disregard technical rules of evidence in the examination of witnesses is of no controlling importance in a proceeding before court to compel a witness to answer questions propounded to them. Evidence which does not tend to reveal the commission of some indictable offense, or to identify the offender, or to lead to the discovery of other material and competent evidence, would not be material. The same technical rules of evidence, so far as practicable, that attain in the trial of causes before the court or a jury should be applied in a proceeding for contempt, and it makes no difference that the offense consists for the refusal to answer questions propounded by, or before, the grand jury. The materialty of the evidence sought, no doubt, may often be apparent from the form and substance of the question asked, but unless this is true the court should inquire sufficiently into the proceedings of the grand jury to determine whether the witness has declined to testify to material matters. Rogers v. Superior Court of City & County of San Francisco, 145 Cal. 88, 78 Pac. 344; In re Archer, 134 Mich. 408, 96 N. W. 422.

It is true that by specific statutory enactment the proceedings of the grand jury are conducted in secrecy. The reasons therefor are apparent from the nature of the duties performed thereby. It would often defeat the very purpose of the inquiry if public revelation was made of the particular offense being investigated, but sufficient information may be imparted to the court and made of record in proceedings of this character, to enable it to determine the materiality and legality of the evidence sought, without violating either the statute or public policy upon which it is based. Proceedings of this character are held in this state to be in their nature criminal, or quasi criminal, and a clear case of contempt must be shown by the evidence where it is required. Russell v. Anderson, 141 Iowa, 533, 120 N. W. 89; Carr v. District Court, 147 Iowa, 663, 126 N. W. 791, Ann. Cas. 1913 D, 378; Wells v. District Ct. of Polk County, 126 Iowa, 340, 102 N. W. 106; Tuttle v. Hutchison, 173 Iowa, 503, 151 N. W. 845. The refusal of the witness upon which the prosecution is based was to answer questions in the presence of the grand jury, and not of the court, and while, as stated, the offense is technically against the authority of the court, it was not committed in the actual presence thereof.

The questions propounded to the plaintiff may have been intended to elicit evidence important and material to some matter properly under investigation by the grand jury, but such materiality clearly does not necessarily appear upon the face thereof. If, for example, the answer of the witness to the first question had been that Leo Hobson was engaged in the dry goods business at Tipton, Iowa, or if,

in answer to the second question, she had stated that Lec Hobson was residing in Kalamazoo, it is hardly conceivable that such evidence would have been material. Before ordering the witness committed to jail for contempt, the court should have required the grand jury to make sufficient showing to enable it to say that the questions were proper, and that they sought to elicit material and important information. Rogers v. Superior Court, supra; In re Archer, supra.

The jurisdiction of the grand jury before which plaintiff was summoned was limited to Linn county, and while it is conceivable that the examination might have resulted in eliciting information tending to show that Leo Hobson was engaged in an unlawful business in Linn county, or that his whereabouts might bear such relation to other facts, or circumstances, as to have an important bearing upon the question of his own or the guilt of some other offender punishable in Linn county, the record before us does not so show.

The evidence in a proceeding to punish a recalcitrant witness for contempt must show affirmatively that he had refused to give legal evidence in a trial before the court or before some other court or tribunal having a right to demand the same.

Section 4466, Code of 1897, requires that where the action of the court is founded upon evidence given by others it must be reduced to writing, filed, and preserved, and if the court acts upon personal knowledge, a statement of the facts upon which the order is founded must be entered on the record of the court, or be filed and preserved when the court keeps no record. The court could not determine the materiality of the evidence sought without a showing of the facts which should have been made of record.

It is the conclusion of the court that the record before us does not sustain the order of the court below, directing that plaintiff be committed to the county jail until such time as she expressed a willingness to answer the above questions, and is therefore annulled.

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